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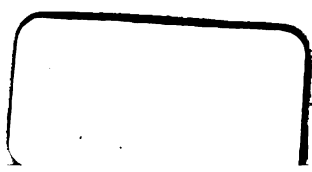
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A  
GENERAL ABRIDGMENT  
OF  
**Law and Equity,**

ALPHABETICALLY DIGESTED UNDER  
PROPER TITLES;

WITH NOTES AND REFERENCES  
TO THE WHOLE.

---

BY CHARLES VINER, Esq.  
FOUNDER OF THE VINERIAN LECTURE IN THE UNIVERSITY  
OF OXFORD.

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*FAVENTE DEO.*

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THE SECOND EDITION.

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and Subdivisions.

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## Not Guilty.

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### (A) Not Guilty: Pleadable. In what Cases.

1. **I**N *decies tantum* Not guilty is no plea, but not ready to give his verdict. Br. Action sur le Statute, pl. 14. cites 8 H. 6. 9, & 10.

2. In writ of *maintenance*, he shall not say not guilty; by which he said, that he did not give, &c. and so not guilty; but the not guilty was not entered, but only that he did not give robes &c. Br. Action sur le Statute, pl. 14. cites 8 H. 6. 9, & 10.

3. Note, that of *general pardon of felony* &c. all are bound to take notice of it, so that *if the felon will plead not guilty, yet the judges ought to refuse it*, by reason of the pardon. Br. Notice, pl. 1. cites 26 H. 8. 7.

4. In action upon the case for a thing which lies in *feasance*, as for burning of goods or deeds &c. Not guilty is a good plea; *contra* for non-feasance of a thing which he ought to do, as making a bridge, park-pale, scouring a ditch, &c. Br. Action sur le Case, pl. 111. cites 2 E. 6. 8. P. Ibid. pl. 77.

5. Error was brought upon a judgment in debt upon the statute of 32 H. 8. for that the defendant pleaded not guilty, which was urged to be no plea in this action; but all the Court held it good when the action is grounded on a penal statute. Cro. E. 257. pl. 34. Mich. 33 & 34 Eliz. Savery v. Tey.

6. In debt brought by a farmer of a rectory upon the statute of 2 E. 6. for carrying away his corn, the tythes not being set out, and demanding the treble value not guilty was pleaded; and all the Court resolved, that it was an issue well enough in this action; for it was not for a \* non-feasance, but for a male-feasance, wherein the tort is suppos'd. Cro. E. 766. Trin. 42 Eliz. B. R. Wortley v. Herpingham.

make an issue any more than two affirmatives; but in action for a mis-feasance it is otherwise. Cro. E. Trin. 39 Eliz. B. R. Yielding v. Fay.

7. And in an action upon the statute, which prohibits a thing upon which a penalty is demanded, the issue may be not guilty, or non  
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debet, and so it has been often rul'd in this Court; wherefore the issue was joined accordingly. Cro. E. 766. in Case of Wortley v. Herpingtonham.

For more of Not Guilty in general, see Actions, and other proper titles.

See Acceptance—Condition (A. d)  
—Estate  
(O. b)

(A) *In what Cases Men ought to take Notice of Things without any Notice given by any other [as to the making or dispensing with a Forfeiture.]*

Cro. C. 497. S. C. —A freeman and citizen of London was chosen sheriff, and for not serving thereof, an action was brought against him on a by law, for 400 l. forfeiture. It was objected, that no notice was given of this election, and it might be, that he was absent at the time of election. But Holt. Ch. J. in delivering the opinion of the Court said, that every freeman and citizen, being a member of

[1.] IF there be *curia legalis* of a manor held twice a year, in which all those who have common in a great moor, parcel of the manor, have used time out of mind &c. to appear, or to be amerced for it, or to be effoigned, and there is a custom, that the steward has used at the said Court to elect and swear a homage out of the commoners appearing to enquire of the oppressions and offences concerning the common, and that the said homage has used to make ordinances, *Anglicè by-laws for the better preservation of the common*, and that all commoners have used to obey those by-laws under a reasonable pain &c. And after, at such Court, an ordinance is made by the homage, that no commoner shall put in his sheep in a certain part of the moor (shewing it by bounds) under the pain of 3 s. 4 d. to the lord; and this ordinance is published and proclaimed in the same Court. Though there be not any express notice to J. S. who is a commoner, and he after puts in his beasts against the ordinance, the lord may *distrein* and avow for this 3 s. 4 d. forfeited (having power by custom to distrein for it) without alleging any notice given of the ordinance to him; because it is in nature of a statute law made by the commoners; for by intendment, all the commoners agreed at the first, that the homage should make such ordinances to bind them; and the custom is, that all commoners ought to appear at Court or to be amerced. And therefore if he appears, he had notice, it being published and proclaimed, and if not, it was his own default; and it being done by the homage, and not by the lord nor steward, the commoners ought to take notice of it. Trin. 14 Car. B. R. between James and

and Tinteny. Adjudged per Curiam in writ of error, upon a judgment in Bank upon a demurrer upon strict avowry. In-  
tratur. 9 Car. Rot. 234. or Trin. 11 Car. Rot. 753.]

the body po-  
litical, it  
supposed to  
be present  
where the

whole body resides; and tho' in fact one of them was absent; yet it was his duty to have been there, and shall be obliged to take notice of this election at his peril. Besides, the election is made in view of the city, of which all persons as members of the body politic are to take notice; and the proclamation is also made in the most notorious place of the city, viz. on the hustings, where every person may take notice of it; and judgment was given for the plaintiff. 5 Mod. 4:8. 442. Trin. 11 W. 3. B. R. The city of London v. Vanacre.—1 Salk. 142. S. C.—Carth. 484. S. C.—12 Mod. 272. S. C.

If a common nuisance is presented at a town or leet, the sheriff or steward may either amerce the person presented, and also order him to remove the nuisance by such a day, under pain of forfeiting a certain sum, or may order him to remove it under such a pain, without amercing him at all. But Serjeant Hawkins says it seems doubtful, whether such a person be bound at his peril to take notice of and obey such order, being made in his absence, unless express notice be given him of it. a Hawk. Pl. C. 61. cap. 10. f. 32.

2. The law will not compel one to take notice of acts done between strangers, or of any incertainty, on pain of forfeiture of his estate or interest. But in such cases notice ought to be given to those that are to be losers. 8 Rep. 93. in Fraunces's Case.

3. Tenant infeoffs his son and heir and dies, the lord accepts the rent from the heir not having notice of the feoffment, yet he shall have his arrears and reliefs. Cro. E. 572. cites 4 E. 3. Release 11.

4. A. made a lease to commence after the determination, forfeiture, or surrender of a former lease, with clause of re-entry for non-payment of the rent afterwards. A. took a secret surrender of the first lessee, and after that surrender a rent-day incurr'd, and no rent was paid by the second lessee; and yet adjudged that his estate is not void, because A. ought to give notice to him of the surrender. Arg. Goldsb. 140. pl. 49. cites 18 & 19 Eliz. 354. pl. 32. & 17 Eliz.

5. Acceptance of rent is no dispensation with the forfeiture, without notice of the forfeiture. Cro. E. 572. Trin. 39 Eliz. C. B. Harvy v. Oswell.

6. A. infeoffd B. in fee upon condition, that if A. within a year after B's death, shall pay 20l. to the heirs or executors of B. he may re-enter.—B. enfeoffs C. and dies, leaving M. his wife and W. his heir his executors. A. paid the 100 l. to W. but being a colourable payment only, was not effectual, [though had the payment been real, it seems the entry of A. had been lawful.] In this case A. was not bound to give notice to C. either of the payment or death of B. for C. is a stranger to the payment, and may know the death of B. as well as A. Jenk. 261, 262. pl. 61. cites 39 Eliz. 5 Rep. 95. b. Goodal's Case.

7. Feoffee of land, or bargainee of the reversion by deed indented and inrolled, shall not take advantage of a condition of non-payment of rent reserved upon a lease, upon a demand by them, without notice given thereof to the lessee. 8 Rep. 92. in Fraunces's Case, cites it as the opinion of Popham Ch. J. in Mallorie's Case—And cites 5 Rep. 113. S. C.

So of Bargainee of the manor by deed indented and enrolled; cited and affirmed for good law, 8. Rep. 92. b. in Fraunces's Case.

8. If the estate of the lord of a manor ceases by limitation of time, and the use and estate of it is transferred to another, who demands the rent of a copyholder, and he refuses to pay it to him; this is no forfeiture, unless notice be given to the copyholder of the alteration of the use and estate. 8 Rep. 92. a. in Fraunces's Case, cites Hill. 1 Jac. Beconshaw v. Southcote.

9. A. was lessee for 90 years, and assigned to B. ten years of the term. B. covenanted to repair &c. A. devised the reversion or residue of the term to J. S. and died. J. S. brought action of covenant against B. One question was, if the action would lie, no notice having been given of the grant? And it was held by Coke Ch. J. and Foster J. that there needed not any notice in this case; because here is no penalty in this case as there was in MALORIE's Case; for there was a condition. Godb. 161. pl. 227. Pasch. 8 Jac. C. B. Bristow v. Bristow.

N. B. The unloading of the ship is not mentioned as part of the condition of the bond, as it seems it should have been, and as it is in the S. C. but upon another point; for which see Condition (M. b.) pl. 9.

10. In debt on bond conditioned to pay 100 l. for freight for his ship 40 days after he should return with his ship to such a port of discharge, verdict was for the plaintiff. It was mov'd in arrest of judgment, that no notice was express'd to be given of the unloading of the ship, and that this being a collateral thing, and penal to the defendant, he ought to have notice of it: but Roll, Ch. J. said, that one party might as well take notice of this as the other; for the thing to be done is not to be done either by the plaintiff or defendant; and the issue being found against the defendant judgment was afterwards given for the plaintiff. Sty. 30, 31. Trin. 23 Car. Lere v. Cholwiche.

11. If one holds stakes upon a wager, he must at his peril take notice who it is that wins the wager. Per North Ch. J. Freem. Rep. 264. Mich. 1679. in Case of Rowley v. Dad.

[ 4 ] 12. A. on sale of wines to B. covenanted to save B. harmless against J. S. and others; a difference was taken Arg. between a covenant to save harmless for enjoying lands, and for enjoying goods, that in the first case there ought to be a disturbance upon title, but in the other case any disturbance is sufficient; therefore if J. S. had brought an action, and been nonsuited, yet it had been a breach of covenant; so if he had brought action, and died, and yet his title could not appear; and tho' no notice was given, judgment was affirmed in error. Skin. 160. Hill. 35 & 36 Car. 2. B. R. Dod. v. Jenkinson.

### (A. 2.) Requisite. In what Cases in general.

1. A Man was restored by parliament to land forfeited, and had writ to the escheator to put him in possession, and he return'd disturb'd by N. who came and said that he had no notice of the restitution

*tution by parliament, &c.* And by the justices he is excused till notice; by which issue was taken, that they occupied after notice: so see that notice is requisite upon an act of parliament; the reason seems to be inasmuch as it is a particular matter; for it seems of a general act all are bound to take notice. Br. Parliament, pl. 35. cites 43 Aff. 29.

2. If debt is brought against executors, and pending the writ they pay debts to others, this is good till they have notice of the suit; contra of payment after the notice. Br. Notice, pl. 16. cites 2 H. 4. 21.

3. The parties who are bound to stand to the arbitrement of others ought to take notice of the award. Br. Notice, pl. 18. cites 8 E. 4. 1. 10.

Br. Arbitrement, pl. 37. cites S. C. and says it was

much argued whether notice ought to be given, especially where the obligation is made to the arbitrator himself; but that it was not adjudged.—8 Rep. 92. in Fraunces's case, cites 18 E. 4. 18. and that there it was agreed by Brian, Vavisor and Camfby J. that the obligor ought to take notice at his peril, and said that it was so adjudged in the same king's time in B. R. And that so the law is without question, against a sudden opinion in 8 E. 4. fol. 1. a.—Br. Dette, pl. 124. cites 1 H. 7. 5.—S. C. cited 8. Rep. 92. b. in Fraunces's Case; for having bound himself thereto, he has taken upon himself to take notice at his peril.

4. If a man be bound to account, and to pay the arrears which shall be found upon the account, it is no plea that he has accounted before such auditors, and is ready to pay the arrears if the auditors will give him notice of them; for he ought to take notice thereof; quod nota; per Cur. and so upon arbitrement he shall take notice. Br. Dette, pl. 168. cites 18 E. 4. 18.

Br. Notice, pl. 13. cites S. C.

5. If tenant for life leases for years, and dies within the term, and the first lessor brings trespass, the termor ought to take notice of the death of the tenant for life. Br. Notice, pl. 15. cites 22 E. 4. 27.

He must remove in convenient time, to be reckoned from the

death of the tenant for life, whether he had notice of it or not; for he in reversion is presumed to be no more privy to it than himself. Per Rainsford. Vent. 201. in case of Fry v. Porter. cites 22 E. 4. 27, 28.

6. Uses were limited by a fine under this proviso, that if the cognisor at any time during his life pay &c. 201. at the font-stone in the cathedral church of Sarum, then the uses to be to the conusor and his heirs. The question was, if a readiness or tender to pay the 201. in the absence of the conusor, or any deputy or servant appointed to receive it for him, be a performance without giving notice beforehand? And Wray, Dier and Manwood seemed of opinion that it was not; because no day or time certain is limited to attend the receipt &c. but during the life of the conusor, which is uncertain to the conusee &c. D. 354. pl. 32. Mich. 18 & 19 Eliz. Barrough's Case.

S. C. cited 8 Rep. 92. b. in Fraunces's Case.

7. Where a man makes an actual revocation of an authority, and before notice the other executes his authority, the revocation being without notice is no revocation. 2 Brownl. 291. Hill 7 Jac. C. B. Vivion v. Wild.

8. Notice is not requisite where one is bound by bond to do an [ 5 ] act. Hob. 14.—8 Rep. 92. b.—Mo. 602.

This was a condition for payment of money; but otherwise it is where a thing is of that nature, that being done, no subsequent notice can retrieve; Per Hale Ch. J. Vent. 203. in *Lady Anne Fry's Case*.

9. Where a condition requires such *an act to be done, as may be done after notice*, it has been questioned whether the law shall not *protract the time* limited for performance until notice be had, Cro. Car. 577. Hill. 16 Car. B. R. Mayor and Commonalty of London v. Alford.

10. None is bound by the law to give notice to another of *that which that other person may otherwise inform himself of*. Mich. 22 Car. B. R. except he tie himself by special covenant and agreement to do it; for the law will not put an unnecessary trouble upon any man without his own consent. 2 L. P. R. 253.

11. Tho' a condition to be performed to a stranger ought generally to be perform'd strictly, yet this is to be intended only in such cases where the party had certain notice of all circumstances requisite for payment thereof. Lane 100. Hill. 8 Jac. in the Exchequer. *Gooch's Case*.

Vent. 207, 204. in *Case of Fry v. Porter*.

\* As where the promise was, that if

a stranger on his coming from beyond sea should affirm so and so, which he did, it was held that this act being to be done by a stranger, and not by the plaintiff, the consufance thereof lies as well in the notice of the defendant as of the plaintiff, and so notice not necessary to be given. Cro. J. 493. Trin. 16 Jac. B. R. *Powle v. Hagger*.—Jenk. 334. pl. 71. S. C.

If two persons are equally concerned, neither is to give notice to the other; otherwise if one is more privy (as heir is more privy to a condition annexed to an estate than a stranger) or more concern'd than the other. 2 Lev. 21. Mich. 23 Car. 2. B. R. *Williams v. Fry*.—1 Mod. 300. —3 Mod. 38.—Where it lies as well in the notice of the defendant as of the plaintiff, the defendant shall take notice at his peril. Per Cur. Freem. Rep. 285. Trin. 1674. in *Case of Corny and Curtis v. Collidon*.

13. Where *estates cease by limitation of uses*, and the land is limited over to another, no notice need to be given; per *Bridgman Ch. J. Cart. 172. Hill. 18 & 19 Car. 2. in Case of Rundale v. Eely & al.*

14. There is a difference where the limitation of the estate and condition are coupled together in a will or deed, and where the condition is in a collateral will or deed, as to point of notice; per *Bridgman Ch. J. Cart. 172. in Case of Rundal v. Eely*.

15. So another difference is where a day is appointed, and where not. Arg, Lat. 97. in *Case of Alfright v. Blackmore*.

16. So there is a diversity, where the act is to be done by two strangers, and where by a stranger and a party; for where the party is party that ought to do the act, there upon doing it he ought to give notice; but notice is not requisite where the act is to be done by two strangers; for there the plaintiff may take notice as well as the defendant. Arg. Sid. 36. Pasch. 13 Car. 2. C. B. *Brown v. Stephens*.

17. Where a man undertakes to do a thing, and the person is certain, so that he may inform himself, and there is no agreement

ment that notice shall be given, he must take notice himself of the thing to be done, as of the quantum of money to be paid &c. Poph. 165. Lev. 47. Mich. 13 Car. 2. B. R. PRICE v. CAR, EMERSON & al. Cro. J. 433. Henning—  
v. Henning. 1 Sand. 33.

18. Where no man is bound to give notice, every man is bound to take notice; but yet *reasonable time* for notice is required. Nor are any persons required to take notice where it is *impossible to take it*. Resolv'd per Curiam. 2 Show. 308. Pasch. 35 Car. 2. B. R. Verdon v. Deacle. Cart. 172. in Case of Rundall v. Eely. cites Cro. C. 391. Gimlet v. Sands.

—Skin. 180. Arg. denies the supposition, and cites TORHAM's Case, who detained one after the dissolution of parliament, as he heard by uncertain rumour and discourse; yet he shall be excused tho' no person is bound to give him notice. So in the common case of one's keeping a dog used to kill sheep, he shall not be liable till notice is given; yet no one is bound to give him notice. Pasch. 36 Car. 2. B. R. in Case of Mallooa v. Fitzgerald. [ 6 ]

19. There are but *three cases* in which notice is not necessary; 1st. In cases of *condition precedent*; 2d. Where the thing is of a *public nature*; 3d. Where *the party imposes the thing on himself*. Arg. 2 Show. 317. Mich. 35 Car. 2. B. R. in Case of Malloon v. Fitzgerald.

20. Notice is *dispensed with* where it becomes *impossible* by the act of the party, as by his absconding. 1 Salk. 214. Pasch. 6 W. 3. B. R. Nurfe v. Frampton.

21. Where a *certain person is mentioned*, as if it were if J. S. pay so much money &c. no notice is necessary; but if it be as *any body* should pay, which is uncertain, there must be notice. 12 Mod. 44. Trin. 5 W. & M. Anon.

22. Per Holt Ch. J. in case of *marriage of one self*, notice need not be averr'd; because marriage is of itself notorious; but Powel doubted. 11 Mod. 48. Pasch. 4 Ann. B. R. Smith v. . . . .

### (A. 3) *Requisite in what Cases. In Assumpsts.*

1. UPON a treaty between A. and B. for the purchase of land, A. in consideration of 20*l.* paid by B. promised that if B. liked not the land he would repay the 20*l.* in a fortnight. In assumpsit by B. he alleged in fact, that he did not like the land, and that A. had not repaid the 20*l.* and had judgment. Whereupon it was assigned for error among other things, because it was not alleged that he gave notice of the dislike within a fortnight, that being a thing secret to himself, whereof the defendant cannot take notice to pay the money; but the Court held that he ought to take notice thereof at his peril; for he hath bound himself thereto by his express promise. Cro. E. 834. Trin. 43 Eliz. B. R. East v. Thoroughgood.

2. Plaintiff declared that the defendant and divers others copy-hold tenants of the manor of D. were plaintiffs in Chancery against

*W. lord of the manor to ascertain their fines by decree, and that in consideration the plaintiff at his costs and labour should procure a decree there for enjoyment of their copyholds at a fine certain, the defendant promised to pay the plaintiff after such decree obtained 3 l. when he should require it.* A decree was obtained accordingly. It was resolved that personal notice need not be given to the defendant of the decree obtained; because it appears by the declaration, that the defendant was one of the plaintiffs in Chancery in the suit in which the decree was granted, so that he himself is party to the decree, and therefore might have as good notice of the success in the suit and decree as the plaintiff. And adjudged for the plaintiff. Yelv. 121. Hill. 5 Jac. B. R. Ash. v. Doughty.

Jenk. 282.  
pl. 11. cites  
B. C. — 311.  
pl. 92. S. C.

that notice  
was not ne-  
cessary; for  
defendant  
might have  
notice by B.  
or other-  
wise; and  
that notice  
by suit and  
proof in this  
case is suffi-

[ 7 ]  
cient; and  
that the bor-  
rower was not bound to seek A. to give him notice.

3. A. promised J. S. that if he would borrow of B. 100 l. he (viz. A.) would repay it at such a time, and on such conditions as should be agreed upon between the said J. S. and B. — The money was lent and the day of payment agreed upon but J. S. died before the day. The money was not paid at the day. B. brought an action against the executor of J. S. and recovered; and thereupon the executor brought action against A. upon his promise to J. S. and judgment being for the executor, error was brought; and it was insisted, that the plaintiff had not alleged any notice given to the defendant of the agreement. But it was adjudged by three judges against one, that tho' where a penalty is to be recovered, notice is not requisite, yet otherwise it is where damages are; for in such case the bringing the action is notice sufficient. Bulf. 12. Hill. 7 Jac. Haverley v. Leighton.

3 Bulf. 86.  
contra—See  
condition  
(A. d.)

\* Hodges v. Moor. — Crane v. Compton.

4. Upon a promise (as to pay so much at the other's marriage) notice is not necessary; secus on a \* bond, because of the penalty. Vent. 78. cites Bulf. 12 & 13.

5. One assumes to save harmless J. S. of all obligations wherein he shall be bound for J. N. And in an assumpsit brought, he shews that he was bound in an obligation for J. N. from which he was not saved harmless, and does not shew that he gave any notice to the defendant; yet it was held good enough; per Houghton J. Cro. J. 433. Trin. 15 Jac. B. R. in Case of . . . v. Henning.

Hard. 42.  
Hill. 1655.  
Harris v.  
Farrand.—  
Cro. J. 492.  
... v. Hen-  
ning, cites  
Twist v.  
Holmes.

6. A. promised to pay B. for an horse which B. bought of C. so much as B. paid to C. for it: B. requests payment without saying how much it cost, and good; for A. ought first to demand of B. upon the request, how much it cost; and B. need not give A. notice without the demand as aforesaid. Jo. 207. Trin. 4 Car. B. R. Jacob v. Cook.

7. Indebitatus assumpsit by E. against L. on a promise to pay him 2 s. a-piece for every cloth he should buy for the defendant, and declares

declares for so much money due unto him, and hath a verdict; the defendant moves in arrest of judgment, That it is not averred by the plaintiff that he gave any notice to the defendant how many cloths he had bought for him, and so it is not certain what is due to him. To this it was answer'd, That the clothes were bought for the defendant himself, and he may very well take notice of the number of them, without any notice given him. 2dly, That here is a *request set forth for the payment of the money*, and this implies a notice. But Roll replied, That the request *doth not imply a notice*, and so is Twist's Case; and besides the notice ought not to be by implication, *but must be averred certainly*; yet let it be moved again. Sty. 53. Mich. 23 Car. B. R. Tanner v. Lawrence.

8. Upon an assumpsit to pay a sum upon the plaintiff's *return from Rome* to England, there needs no notice. The plaintiff is not bound to seek the defendant. Jenk. 282. pl. 11.

9. Where the duty accreus upon the *private act of the plaintiff* there ought to be notice in assumpsit; but not where it is possible for the defendant to know it. Jenk. 282. pl. 11. cites Hob. 51.

10. Action of debt upon an assumpsit by the defendant *to enter into a judgment unto the plaintiff for so much monies as Sir John Hall did owe unto the plaintiff, if the plaintiff would take common bail of him the defendant, if Hall should die before such a day*; and for not performing his promise the action was brought. Upon *non assumpsit* pleaded, there was an issue joined, and a verdict found for the plaintiff. The defendant moved in arrest of judgment, and shewed, that it doth not appear, that there was any notice given by the plaintiff to the defendant, *how much money was due to the plaintiff from Sir John Hall*, as there ought to be. Roll Ch. J. answered, You did undertake to know, at the time of the assumpsit, how much money he did owe, and notice is not necessary; and if it were he might have gone to Sir John Hall to tell him, and so it shall not only be intended to be in the knowledge of the defendant himself, but that he might have also knowledge of it by others. Jermain justice doubted; but Nicholas and Aske, judges, were of Roll's opinion, and the plaintiff order'd to take his judgment, if better matter were not shewn. Sty. 148. Mich. 1649. B. R. Johns v. Leviston.

11. If one be bound by an *assumpsit generally to do a thing to another, he to whom the promise is made must give him notice when he will have him to do it*, because it is in his election when he will have it done. 2 L. P. R. 239.

there he to whom the thing is to be done, is not bound to give notice to that other person when he will have it done, but the party must procure it at his peril. 13 May, 1651. Pasch. B. R. For it may be he may not know that other person, and there is no privity of contract between them two, as there is betwixt the other two. 2 L. P. R. 239.

12. J. S. ow'd A. 30l. by bond; B. promis'd that if A. delivered up the said bond he would pay A. the said 30l. A. set forth this

[ 8 ]  
But if he  
promises  
that another  
person shall  
do it to him,  
11 Mod. 48.  
Smith v.  
.... seems

to be S. C. and there per Holt Ch. J.

*Whereas the party might have notice*

*by their own inquiry*

*notice is not necessary*

this matter, and further said, that he *deliver'd up the said bond to* J. S. whereof B. the defendant had notice. It was held, that there needed no notice; because the *defendant knew whom to resort to*; and the difference is, *where a person is nam'd, and where not.* 2 Salk. 457. Pasch. 4 Annæ B. R. Smith v. Goff.

as here in this case, the bond must be intended to be deliver'd to the obligor, tho' he is a third person, and he might have applied to him to have notice, and therefore ought to take notice of the delivery.

### (A. 4) Requisite. In what Cases. In Matters of Practice in Superior Courts.

For general rules are the general practice of the Court, whereof every one must take notice that hath to do there; but

particular rules are made upon particular and extraordinary matters happening in the proceedings upon the motion of one of the parties made to the Court, of which the other may be ignorant, and therefore is to have notice of them given unto him. 2 L. P. R. 234.

1. THE plaintiff and defendant are both bound at their peril to take notice of the *general rules* of practice of this Court; but if there be a *special-particular rule* of Court made for the plaintiff, or for the defendant, he for whom the rule is made ought to give notice of this rule unto the other; or else he is not bound generally to take notice of it, nor shall be in contempt of the Court, altho' he do not obey it. 2 L. P. R. 204. cites Pasch. 24 Car. B. R.

2. If a *declaration be engrossed and put into the office, although it be not filed*, yet is the defendant's attorney bound to take notice of it. Mich. 22. Car. B. R. For it is the duty of the plaintiff's attorney to put the declaration into the office, and the officer in the office is to file it; and though it be filed, yet may the defendant's attorney take a copy of it. 2 L. P. R. 235.

For if they knew them not, yet they may inform themselves

by their counsels and attorneys: but this is only to be understood of the *general rules, and not of particular rules* made upon the motion of either party; for of such rules there ought to be notice given to the party concerned by the other for whose advantage the rule is made. 2 L. P. R. 236. cites Pasch. 24 Car. B. R.

3. The plaintiff or defendant are both bound to take notice of *such rules* of the Court as do concern the proceedings of their cause, at their own perils. 2 L. P. R. 236. cites Hill. 22 Car. B. R.

4. When counsel are to *argue a matter in law* in Courts, the judges ought to have notice thereof given unto them before the day, except it be where the Court have appointed a set day for it: or if there be not such notice given, then the cause is to be put in the paper of causes, that it may come on in course to be spoken unto. Pasch. 23 Car. B. R. And by putting it in the paper the judges have notice; for they have a paper of the causes to be spoken to in matter of law, the day before they be spoken to, by the officer of the Court. 2 L. P. R. 236.

[ 9 ]

5. When either the plaintiff or defendant doth intend to move the Court in any matter which may prove disputable, the party that thus

thus intends to move *ought to give notice* to the other party, that he doth intend to move the Court in it, *and to exprefs for what he will move, and when.* Mich. 1650. B. S. that he, against whom the motion is to be made, may not be surpris'd, but may have time to provide, and may attend the Court to defend himself, and answer the motion, which the Court will give him time to do; so that if such notice be not given him, the motion will be to no purpose as to the deciding of the difference in question. 2. L. P. R. 238.

6. One is not bound to give notice to another of a rule of Court made against him, *except part of the rule be, that notice shall be given unto him of the rule.* Trin. 1651. B. S. For it is intended, that his attorney, or solicitor, was in the Court when it was made, and that he did take notice of it from them; or else, that there needs no notice in the case, because the party ought to have done that which he was ordered to do, with the rule made in the case. 2 L. P. R. 239, 240.

7. A writ of error was sued out and allowed about the very same time that the execution was serv'd, but before: the Court was of opinion, that being su'd out and allow'd before the execution was serv'd, it must be set aside, tho' the defendant had no notice of it. 8 Mod. 373. Trin. 11. Geo. Moorfoot v. Chivers.

8. A motion was made to enlarge a rule, but the party not coming on the day on which the rule was made to shew cause, and having given no notice of the motion, the Court refus'd to enlarge the rule 'till notice given; for that in such case notice ought always to be given. Rep. of Pract. in C. B. 67. Mich. 4 Geo. 2. Dale v. Careless.

The Court will enlarge no rule for shewing cause, unless notice be given of the motion to enlarge

such rule and affidavit made of such notice. Rules and orders in C. B. Mich. 2. Geo. 2. 1728.

9. On a motion in arrest of judgment the last day of the term, the Court said, That no motion in arrest of judgment should hereafter be made on the last day of the term without notice. Rep. of Pract. in C. B. 106, 107. Trin. 7 & 8 Geo. 2. Camp, qui tam, &c. v. Gale.

## (A. 5.) Requisite to avoid being, or to make a Man a Tortfeasor.

1. **O**F a particular act of parliament a man is not bound to take notice till he can have thereof notice; but of a general act of parliament, every one is bound to take notice at his peril, immediately; note the difference. Br. Notice, pl. 9. cites 43 Aff. 29.

2. Where I retain a servant, and after he goes from me and is retained with another, I cannot take him without notice given to the

For where a man retains a servant of

another, and *the second master*, scilicet, request. Br. Notice, pl. 4. cites 21 H. 6. 9.  
 has no notice of the first retainer, this is not trespass, nor action does not lie. B. R. Notice, pl. 8. cites 9 E. 4. 33.  
 —S. P. And so of lord of a villein. Br. Notice, pl. 2. cites 50 E. 3. 21.

3. A man who retains a servant ought to take notice of every former retainer in the same county, *contra* of the retainers in another county; for where a man retains a servant in another county than where the first master retain'd him, the first master cannot re-take him without giving notice to the second master, unless the second master has other notice of it. Br. Notice, pl. 20. cites 17 E. 4. 7.

[ 10 ] 4. If a man imprisons another tortiously in a house, and delivers the key of the house to his servant, there, if the servant has notice thereof and does not deliver him out, this is imprisonment in the servant. Br. Notice, pl. 24. (bis) cites 22 E. 4. 44.

5. A. licensed B. to lay his hay on A's land till B. could conveniently sell it. Two years after the licence A. leased the land to J. S. who put in his cattle, and they eat up the hay. Montague Ch. J. and Doderidge J. held that B. ought to have had notice from the lessee before he had put in his cattle. But it was resolved, that the plaintiff had a convenient time (viz. 2 years) for the removing of his hay, and therefore judgment was given against him. Poph. 151. Hill. 17 Jac. Webb v. Paternoster.

6. In *trover &c.* for taking his cattle and selling them, the defendant justified by warrant of commissioners of sewers for not paying a tax by them set towards repairs of the sea walls. Upon demurrer several exceptions were taken, and among them was this, viz. That the plea did not set forth, that any notice was given to the plaintiff of the tax made before the distress taken, and for that and the other exceptions Roll Ch. J. concluded that the plea was not good, to which Bacon J. accorded, and rule was given for judgment accordingly nisi causa &c. Sty. 12, 13. Pasch. 23 Car. Whitley v. Fawcett.

### (B) What is Notice.

1. IN trespass, the defendant said, that a bargain was had between them at D. *that the defendant should go to S. and see the plaintiff's corn, and if it pleased him upon the view, and should give the plaintiff 40d. for every acre, that he should have it;* by which he went and view'd the land, and was pleased with it, and took it, which is the same trespass; and per Littleton, Choke and Brian J. this is no plea, because he does not shew that he is paid; but *contra* if a day of payment had been agreed; for if a man cheapens wares at a price certain, and the vendor agrees to the price, this is no bargain, nor shall he take the wares if he does not

not first pay, or has a day of payment given; and as to the notice to be given to the vendor, here it seems to me, that when he took the corn, this is notice to himself that he was pleased with the corn. Br. Contract &c. pl. 25. cites 17 E. 4. 1.

2. A. being seised of land in trust and confidence for B. and his heirs, treats with J. S. for the sale thereof, and during the treaty, *a stranger says to the vendee, Take heed how you buy such land, for A. has nothing in it but upon trust for B.* and another comes and says to the vendee, That it is not as the stranger informed him; for that A. is seised absolutely, whereupon J. S. buys the land. The question was, in Chancery, to whose use the vendee should be seised, and if this be sufficient notice? and it was decreed, that it was not; for if *flying reports* should be admitted, every man's title might be slandered. Goldsb. 147. Hill. 43 Eliz. Wildgoose v. Wayland.

3. Tenant of a manor covenanted to find necessary provision for the steward &c. whenever he shall keep Court there; per Doderidge, personal notice need not be given; for general notice, as proclamation at Court, is given him. Palm. 532. Pasch. 4 Car. B. R. Bishop of Rochester v. Young.

4. If money be promised on marriage with a daughter, request is notice enough. Lat. 15. Hodges v. Moor.—But if the promise be by a stranger, there ought to be notice. Lat. 97. Al-fright v. Blackmore.

So of aniece, the action lies without notice. Sid. 36 Pasch. 13 Car. 2.

C. B. Brown v. Stephens.—Hard. 42. Hill. 1655. in Case of Harris v. Ferrand.

5. Exception is of leases for three lives, in one of such leases there is a covenant to renew paying 20 l. This is notice *imply'd*; for they ought to see the covenants; per Finch K. Pasch. [ 11 ] 27 Car. 2. Chan. Cases 260. Tanner als. Davis v. Florence.

6. A recital of a deed, which refers to the incumbrance, is notice against a purchaser. Mich. 28 Car. 2. 1 Chan. Cases 291. Bilco v. Earl of Banbury.—So where a deed refers to a will. Mich. 30 Car. 2. 2 Chan. Cases 246. Moor v. Bennet.

7. In all cases where a purchaser can't make a title but by a deed which leads him to another fact, the purchaser shall not be a purchaser without notice of that fact, but shall be presum'd cognizant thereof; for it is *crassa negligentia* that he sought not after it. Mich. 30 Car. 2. 2 Chan. Cases 246. Moor v. Bennet.—So if the title must be by a will. Arg. Hill. 1682. Vern. 149. Bovey v. Smith.

G. Equ. R. S. Tr. 7 Ann. Vane v. Ld. Bernard.

8. A. having notice of a decree, to which he was no party, pays money contrary to that decree; it was order'd that he should pay the money over again. Vern. 57, 122. Hill. 1682. Harvey v. Mountague.—This notice was only by being present in Court when the decree was pronounced. Ibid.

(C) *How the Notice must be ; and by whom to be given.*

Cro. Car.  
392. S. P.

1. **T**HE notice of deprivation or resignation ought to be given by the ordinary himself, and not by a stranger. Br. Notice, pl. 25. cites Doct. and Stud. lib. 2. cap. 31.

2. When notice ought to be given, the law appoints who shall give it ; where none is bound to give it, defendant ought to take notice of it at his peril. Cart. 172. Hill. 18 & 19 Car. 2. C. B. in Case of Rundale v. Ely & al.—cites Cro. Car. 391. Gimlet v. Sands.

3. Notice directed to be given by act of parliament must be certain and particular. 6 Rep. 29. b. Trin: 44 Eliz. B. R. in Green's Case.

4. If one be bound by the rules of the Court, to give unto another personal notice of a thing, it is not sufficient that notice be left at the dwelling house of the party. Mich. 23 Car. B. R. For personal notice is notice given to the person of the party himself, and not to another, or at the dwelling house of the party ; for notice may be given there, and yet the party may not know it : and usually where personal notice is to be given for the party to do a thing, it is very penal to him if he do it not. 2 L. P. R. 237.

(D) Good. *To whom it must be.*

Notice to repair given at the house is not sufficient, but it ought to be to the person of the lessee, and Popham agreed to this. Owen 114. Streetman v. Everfly.—Notice to assignee of part of the term, or at the house, is not sufficient. Yelv. 36. Pasch. 1 Jac. B. R. Sweton v. Cuthie.

1. **N**OTICE to repair to an occupier of the house, and who is not lessee or assignee of the term, nor has any interest in the term, is not sufficient, but it ought to be to the person interested in the term, who is liable to reparations. Owen 114. Hill. 44 Eliz. B. R. Streetman v. Everfly.

and Popham agreed to this. Owen 114. Streetman v. Everfly.—Notice to assignee of part of the term, or at the house, is not sufficient. Yelv. 36. Pasch. 1 Jac. B. R. Sweton v. Cuthie.

2. Condition was to pay so much as an apprentice should embezzle &c. within 3 months after proof made by confession &c. and notice thereof given. Notice was given to obligor, but he dying left an executor ; notice now must be given to the executor also. Cro. J. 302. Mich. 13 Jac. B. R. Gold v. Death.

3. Tho' notice to a man's counsel be notice to the party, yet where the counsel comes to have notice of the title in another affair, which it may be he has forgot when his client comes to advise with him in a case with other circumstances, that shan't be such a notice as to bind the party ; per Ld. Keeper North, Hill. 1684. Vern. 287. in the Case of Preston v. Tubbin.—

Constructive

[ 12 ]  
Whether notice to a counsel or agent once employ'd and goes not thro' with

Constructive notice to counsel must be at the particular time. Arg. Gibb. 211. per Reynolds Ch. B. 213. Fitzgerald v. Ld. Falconbridge.—Held in Dom. Proc. that notice to counsel is not sufficient.

*the business shall be notice to the party himself dubitatur, per Ld.*

Cowper? G. Equity, R. S. Trin. 7. Annæ. Vane v. Ld. Bernard.—The party that intends to move the Court in a questionable matter, ought to give notice thereof to the party against whom he intends to move, or to his attorney or solicitor, and not to his counsel; for such notice is not good: for the counsel is not concerned to take notice of any thing but from his client, nor bound to seek out his client, to give him notice. 2 L. P. R. 242.

(D. 2) Good. *What is by Presumption; to one where it shall affect another.*

1. A. Purchased lands for B. his son, which C. had contracted before for the purchase of, and of which B. had no notice, but A. had. The Court declared, that this notice to the father was notice to the son, and should affect him, tho' he was the purchaser, and not the father. Chan. Cases 38. Mich. 15 Car. 2. Merry v. Abney and Kendal.

S. C. and almost the same words as in Chan. Cases 38. and seems to be taken from it. 2

Freem. Rep. 151.—Abr. Equ. Cases 330. pl. 1. cites S. C. by name of Abney v. Merry.—M. Chan. R. 59. S. C. 13 Car. 2. by name of Hollowell &c. v. Abney &c.—MS. Tab. tit. Notice, cites 16 Dec. 1724. COOT & MAMON, that notice to the father was presum'd to be good notice to the son.

2. A. devised land to B. in trust for C.—B. sells the land to D.—D. sells to E.—C. brings a bill. D. confesses notice in his answer of the trust. This confession by answer of D. will bind E. as to the title E. derives from D. Vern. 486. Mich. 1687. Walley v. Whaley, Gaudy and Warner.

3. A. treating for the purchase of a copyhold estate has notice of a mortgage surrender, so that A. purchases in B's name, and then procures B. to become purchaser; B. pays the consideration money without notice of the mortgage. Tho' B. did not employ A. and tho' the purchase was made before B. knew any thing of it, yet B's approbation afterwards made A. his agent ab initio, and the notice which A. had shall affect B. Per Cowper C. Pasch. 1700. 2 Vern. 609. Jennings executor of Guidott v. Moor, Blincorn & al.

(E) Good. *At what Time.*

1. Covenant to pay for the better support and maintenance of his wife 200l. within 2 years next after he shall be required, to such persons as she shall by deed sealed and delivered in presence of three witnesses, assign and appoint. She doth appoint 200l. to be paid to A. and dies before notice to the covenantor; after her death they give notice; he pays it not. The question was,

was, whether, this being for her support and maintenance, the notice ought not to be in her life-time? Per Cur. it need not. Skin. 34. Hill. 33 & 34 Car. 2. B. R. Roe and Marshall.

[ 13 ] (F) Good. As to *Matters of Practice* in the Superior Courts.

1. IF one give notice to another *that he will move the Court in one thing, and tells him in what, and at the time he moves the Court in another matter, and not in that whereof he gave notice, that he would move the Court in; this is not good notice of the motion, but the Court will give the party farther time to answer the motion.* By Rolle Ch. J. For by such deceitful notice the party concerned cannot prepare to answer the motion; and *such notice is accounted no notice.* 2 L. P. R. 240.

2. By a notice fix'd up in the prothonotary's office, Hill. 7 Geo. 1733, attornies are desired to observe, that *in notices to appear to be serv'd upon defendants with copies of process, pursuant to the late \* act of parliament* the day of the return of such processes must be inserted, although it happens to be upon a *Sunday*. Rules and Orders of the Court of C. B.

\* 5 Geo. 2.  
cap. 27.

3. By an order made in Easter term 10 Geo. 2. 1736, all notices are directed to be *given before 9 o'clock in the evening.* Rules and Orders of the Court of C. B.

(G) Of what the *Law* takes Notice.

See Intend-  
ment. In-  
tent.

THE common law doth not take notice of the intentions of the party to do any unlawful act, except it be in case of high treason. Trin. 22 Car. B. R. For man's law is to regulate the words and actions of men and not the thoughts, of which it cannot have conusance; but God's law extends to the thoughts, and tends to the regulation of them also. 2 L. P. R. 235.

(H) Pleadings.

Mo. 845. &  
848. S. C.  
but not S. P.  
—3 Bulf.  
55. S. C.  
not S. P.—  
Hob. 92,  
93. S. C.  
and P.

1. A Bond was given by the father to the master of an apprentice to recompence any waſt &c. to be done by the apprentice, within three months after due proof thereof, either by confession of the apprentice, or otherwise howsoever, and notice thereof given &c. The father died. The son by writing under his hand confessed waſt to the amount of 400 l. In debt against the executor upon the bond, judgment was given for the plaintiff upon a demurrer; and a writ of error being brought, exception was taken to the replication, that tho' it did allege that notice was given

given by him to the defendant, yet it did not allege that this notice was given to the defendant after the death of the testator ; for if it was in his life-time, it was to no purpose, and the Strongest shall be taken against him who pleaded it, and this was held by all the justices and barons to be a material exception, and an incurable fault ; for it *shall not be aided by any intendment* ; and for that reason judgment was reversed. Cro. J. 381. Mich. 13 Jac. B. R. Gold v. Death.

2. In assumpsit the declaration was, That the defendant in consideration of 10 l. received would pay the plaintiff 50 l. when he returned from *Hamburgh into England*, and alleg'd that he went over sea unto *Hamburgh* aforesaid, and returned such a day to the parish of *St. Clements Danes*, and that he demanded the money, and the defendant had not paid. After verdict and judgment for the plaintiff, it was assign'd for error, that plaintiff did not allege he gave notice to the defendant of his return ; and tho' it be alleg'd that the defendant *habens notitiam inde*, and upon such a day requested had not paid ; yet it was held insufficient ; for *he ought to have alleged express notice, and shewn the day and place of such notice given*. The judgment was reversed. Cro. C. 571. pl. 9. Hill. 15 Car. B. R. Anon.

3. Debt was brought on a bond ; the condition was to give notice to the obligee if he should sell such land. The defendant pleaded that he gave notice *secundum formam & effectum conditionis*, and it was held to be a bad plea ; for he ought to shew how he gave notice, that the Court may judge whether or no it was according to the condition ; as when a man pleads a discharge. Freem. Rep. 247. Hill. 1677. Harwood v. Helyard.

4. In *avowry* of a distress for refusing the office of constable it is too general to say *notitiam habuit* ; but it should be pleaded that he was summoned within a convenient time to take the oath before a justice of the peace, which is the course usually taken ; for the steward of the leet has no authority after the adjournment of the Court. 12 Mod. 88. Hill. 7 W. 3. Fletcher v. Ingram.

[For more of Notice, see Bills of Exchange, Conditions, Purchases, and other proper titles.]

## (A) Novel Assignment.

As when the plaintiff declares of trespass clausum fregit, cutting down grafs &c. in such a parish and county, the defendant pleads and says, that the place where &c. are 10 acres of &c. and are his own freehold, per quod he entered &c. as into his own freehold &c. Reg. Plac. 109. cap. 3. Then the plaintiff says, the close and place where &c. are 20 acres of &c. lying in the parish of &c. and called and known by the name of &c. other than the said acres mentioned in the defendant's plea, and for that the defendant hath not answered to the trespass in the 20 acres newly assigned, the plaintiff pet' judic' & dampna sua occasione transgr' Ibid. To this new assignment the defendant must plead, if he hath any thing in bar thereof, Ibid. cites Br. tit. Trespass.

1. NOVEL assignment is in the nature of a replication, and it is used for the better setting down, and ascertaining of the time and place &c. which was not before well assigned, but generally in the declaration. Reg. Plac. 109. cap. 3.

2. This new assignment is used often to clear a title which comes in question upon it; and here if the title appears to be the plaintiff's, he shall recover damages; but he recovers no possession, as in ejectment. Ibid. cites Compl. Solicitor. 219.

3. If the defendant justifies by jointenancy and survivor, the plaintiff may shew that it is other land in the same vill, and give name, and that the tenant died seised and he entered by ward, and was possessed till the defendant did the trespass, and of which he had conceived his action, and so a man may make a new assignment as well in other actions as in common action of trespass. Br. Trespass, pl. 205. cites 24 H. 6. 3.

S. P. Br. Deputy, pl. 21. cites 9 E. 4. 23.

[ 15 ]

This should be 9 E. 4. 23. b. pl. 27. And in assise of rent, if the tenant pleads in bar of one rent, the plaintiff may say that his plaintiff was of another rent. Br. Trespass, pl. 284. cites 9 H. 7. 6.

4. The defendant intituled himself to six boxes and charters, and the plaintiff shewed that he demanded six other boxes and charters, and because he did not answer to it demanded judgment, and prayed delivery &c. And there Littleton said that it was held by him and his companions that in any action where the certainty is put in the count or in the writ, the plaintiff cannot assign that his action is of another thing &c. neither in assise, nor in writ of entry sur disseisin, nor in writ of entry upon the stat. R. &c. Br. Trespass, pl. 183. cites \* 5 E. 4. 23.

5. In trespass of a horse taken, the defendant pleaded gift of the plaintiff, and the plaintiff said that he had a white horse and a black horse, and he gave to the defendant the black horse, and he took the white horse, this is no plea; for the defendant has answered to the horse of which the plaintiff made his plaint. Br. Trespass, pl. 284. cites 9 H. 7. 6.

6. New assignment larger than the declaration is good in trespass,

pafs, but not in ejectione firmæ. Winch. 65. Paſch. 21 Jac. C. B. *Avis v. Gennie*.

7. If the novel assignment assigns in one acre of land in quodam campo, without the name of the acre or buttels, it is not good. Reg. Plac. 203. cap. 5. cites Dyer 264. 2 Cro. 594. 3 Cro. 355. 492.

8. The plaintiff declared that he was ſeiſed of a ſhip which he employed *pro commoſo ipſius*, and ſhewed how &c. and that upon her return the defendants ſeiſed the ſhip, *March 1. &c.* & *huc uſque detinent per quod &c.* the defendant pleads *actio non, quia* they are incorporated &c. and ſhews the charter &c. and that they ſeiſed the ſhip upon ſuſpicion &c. *pretextu* of a proceſs out of the admiralty *que eſt eodem captio & detentio*; and after by deed between the plaintiff and defendants in behalf of the *East India Company agreeatum fuit*, that &c. It was alſo agreed that the plaintiff ſhould ſubmit to the judgment of the Court of Admiralty, and that there ſhall be a releaſe of all actions to the Company, and all the members of it, and ſhew that the plaintiff releaſed, and they ſhew it to be the ſame caption &c. The plaintiff replies, and prays oyer of the agreements, and takes proteſtation &c. and *pro placito dicit*, that the defendants took the ſhip *March 1.* which was before the caption upon the proceſs in the Admiralty, and that this is the caption upon which the action is brought, and concludes &c. upon which the defendant demurr'd; this ſeems to be a *novel assignment*, and adjudged that the agreement will not aid, becauſe 'tis but conveyance, and not relied upon; and it was ſaid that the defendants can take no benefit of the releaſe in their natural capacity. Skin. 281. 284. Hill. 2 W. & M. B. R. *Price v. Child*.

9. *Treſpaſs* for taking the cattle in D. The defendant pleaded, that the locus in quo was 20 acres &c. where he had common, and juſtifies for damage feaſant; the plaintiff replied, that he took them in ſuch a place (*viz. another*). And it was agreed per Holt Ch. J. and Powel, that the plaintiff might have a new assignment. 1 Salk. 453. Trin. 2 Ann. B. R. *Coke v. Evans*.

10. *Treſpaſs* for taking and carrying away his goods in D. The defendant pleaded that the locus in quo was his freehold, and that he took the goods damage feaſant &c. The plaintiff demurr'd generally, and had judgment; for the action being tranſitory, there is no locus in quo ſuppoſed; otherwiſe in treſpaſs quare clauſum fregit in D. the clauſum is a locus in quo; but in the principal caſe there is no place in particular ſuppoſed, only D. is alleged for a venue; therefore if the defendant will make the place material, it muſt come on his part to ſhew a place certain. Alſo in treſpaſs quare clauſum fregit in D. if the defendant plead liberum tenementum, and iſſue be joined thereupon, it is ſufficient for the defendant to ſhew any cloſe that is his freehold; but if the plaintiff gives the cloſe a name, he muſt prove a freehold in the cloſe named. So adjudged in C. B. and the judgment

affirmed in B. R. upon a writ of error. 2 Salk. 453. Hill.  
2 Ann. B. R. Helvis v. Lamb.

[See more at Trespass (U. a. 4), and other proper titles.]

1. **N**UDUM pactum as it is defin'd in the civil law, *est ubi nulla subest causa præter conventionem. Sed ubi subest causa fit obligatio & parit actionem. Item nuda pactio est tenuis & destituta tam nomine proprio quam mutatione rerum & factorum manens in simplici paciscentium colloquio.* Pl. C. 309. b. in Case of Sharrington and Pledall v. Strotton.

2. The reason why the law has provided that contract by words shall not bind without consideration is, because words are spoke or uttered many times by men without much consideration or deliberating. Arg. Pl. C. 308. b. Mich. 7 & 8 Eliz.

Br. Dette.  
pl. 206.  
cites S. C.  
Brook says,  
it seems that  
action upon  
the case  
upon assumpsit lies  
thereof, but not debt; for there is not quid pro quo——S. P. Br. Dette, pl. 36.  
cites 44 E. 3. 21.

3. In debt a man received 10 l. against N. and one P. came to the plaintiff, and said, that if he would release the 10 l. to N. he would be his debtor; by which he releas'd, and the plaintiff brought debt against him who promised; and it does not lie by the opinion of the Court; for *ex \* nudo pacto non oritur actio.* Br. Dette, pl. 79. cites 9 H. 5. 14.

\* S. P. Pl. C. 302. in Case of Sharrington and Pledall v. Strotton.——Ibid. 308. b.——10 Mod. 295. Joffelyn v. Lacier.

4. If a man takes upon himself to do such a thing, and does not express what he shall have for his labour, the bargain is void; per Rolfe; quod nota, that it is no bargain if there be not quid pro quo. Br. Contract, &c. pl. 5. cites 3 H. 6. 36.

Br. Jurisdiction, pl. 53. cites S. C.——  
\* The reason was, because the buyer of the debts could not have quid pro quo. 11. Conference, pl. 4. cites S. C.

5. In debt upon an obligation, the defendant said, that at another time this matter was debated in Chancery, and there decreed ut sequitur, viz. he bought of the plaintiff certain debts, which were due to him by several persons for the sum in the obligation, and because they were only things in action of which no property pass'd from the plaintiff to him, therefore he prayed remedy in conscience; and upon subpæna the now plaintiff, then defendant, appeared, and the matter was adjourned into the Exchequer chamber; and there, before all the justices of the one bench and the other, the matter was well debated, and agreed, that \*

that \* in conscience the obligation ought to be cancell'd or releas'd; upon which the Chancellor awarded in the Chancery, that the obligation be brought in and cancell'd, or that the now plaintiff release it; which the then defendant, now plaintiff, refused, by which he was committed to the Fleet, there to remain till he would do it, who yet remains there, which is the same obligation; judgment &c. And the best opinion was, that it is no bar, for the obligation remains in force. Quære if it had been awarded, that the obligation should be void. Br. Dette, pl. 119. cites 37 H. 6. 13.

—Upon nudum pactum there ought to be no more help in Chancery, than there is at the common law. Cary's Rep. 7. cites 15 H. 7.

6. Where the thing, for the doing whereof a promise is made, is a *matter of charity*, as the curing a poor man, or repairing a way, it is not nudum pactum. Arg. Pl. C. 305. b. 306. in Case of SHARINGTON and PLEDALL v. STROTTON.—— cites 17 E. 4. 5. Br. Debt, 161. M. 37 H. 6. 9. Per Moyle. Doctor and Student, 105.

7. Every deed imports in its self a consideration, viz. the will of the maker, and therefore it never shall be said to be a nudum pactum, where the *agreement* is by deed. Arg. Pl. C. 309.—— [ 17 ] See tamen Chan. Cafes 239. Mich. 26 Car. 2. Negus v. Fettiplace.

8. A. in consideration he was indebted to B. in 20 l. *promised to deliver* diverse cattle to C. to the use of B. Here is no consideration expressed which can relate to the *discharging the debt* of 20 l. and so the promise is but nudum pactum; and B. notwithstanding the promise, is still at liberty to bring his action against A. for the money. Sti. 330. Godwin v. Batkin.

9. Twenty pounds were promised a wife to *procure a release* from her husband (the debt being satisfied by payment and security, which is a release by law, and a payment) this is nudum pactum. 1671. 3 Ch. R. 70. Stuckly v. Cook.

N. Ch. Rep. 80. S. C. Stuckly v. Cooke.

10. A. is possessed of Black-acre, to which B. has *no manner of right*, and A. desires B. to *release him all his right* in Black-acre, and promises him, in consideration thereof, to pay him so much money; sure this is a good consideration, and a good promise; for it put A. to the trouble of making a release; per Holt Ch. J. 12 Mod. 459. Pasch. 13 W. 3. in Case of Thorp v. Thorp.

[For more of Nudum Pactum, see Accord, and other proper titles.]

## Nul tiel Person, or Will.

## (A) Pleadings. Nul tiel Person.

§. P. Br.  
Negativa,  
pl. 6. cites  
40 E. 3. 36,  
37.

1. **I**N *precipe quod reddat*, the tenant vouch'd A. and the sheriff returned the writ of summons, that the demandant A. is dead, by which the tenant vouch'd B. sister and heir of the said A. and the demandant said, that there is no such B. Priest. &c. and the issue accepted, without saying no such B. sister and heir of A. but generally that no such B. Br. Issues joines, pl. 73. cites 40 E. 3. 37.

2. Counterplea was suffered where K. was vouch'd as sister and heir of A. The demandant said, that no such sister and heir of A. and permitted, and therefore is not pregnant. Br. Negativa, &c. pl. 56. cites 41 E. 3. 28.

3. *Quare impedit* by the King, who made title by the heir in his ward, because J. S. was seised of 4 acres of land in D. with the advowson appendant, and presented and descended to the heir as son of N. son of W. son of M. son of the said J. S. there it is no plea that no such W. in *rerum natura*; for W. is in the mesne conveyance, which is not traversable. Br. Traverse per &c. pl. 353. cites 43 E. 3. 7.

4. Trespass against M. and G.—M. said, that no such G. in *rerum natura*, for he was dead before the writ purchased; judgment of the writ; and notwithstanding this the writ was awarded good. Br. Brief, pl. 69. cites 44 E. 3. 18.

5. In trespass the defendant justified for distress for rent service, and the plaintiff alleged unity of possession in the land and rent in J. S. ancestor of the defendant; to which the defendant said, that he never had such ancestor, and a good plea. Br. Traverse per &c. pl. 356. cites 2 H. 5. 11.

6. Appeal against several, and the one said, that there was no such John in *rerum natura* the day of the writ purchased, and no plea, but shall say, that he was dead the day of the writ purchased, or that there was never such John in *rerum natura*; nota. Br. Brief, pl. 24. cites 27 H. 6. 6.

[ 18 ] 7. Trespass against several, of assault, battery, and taking of bows and arrows, and a coat of mail, and one of the defendants said that there is no such in *rerum natura*, as one named in the writ, judgment of the writ; and held there that this is a good plea. Br. Trespass, pl. 37. cites 35 H. 6. 50, 51. and 20 H. 6. 30. and 37 H. 6. 36. and 14 H. 6. 3.

8. So for the one to plead the death of the other. Br. Trespass, pl. 37. cites 35 H. 6. 50, 51.

9. Appeal

9. *Appeal against J. N. of D. in the county of N. yeoman, and others; the one of the others who was principal said, that there was no such J. N. of D. in the county of N. yeoman in rerum natura the day of the writ purchased, &c. and to the felony not guilty.* And per Hufley and Jenney, the plea is double and treble; but it is a good plea, that *no such J. N. in rerum natura the day of the writ &c. or no such J. N. yeoman in rerum natura &c. or no such J. N. of the county of N. in rerum natura.* *Quere*; for the argument was, whether all as above shall be his name, as knight, duke, earl, &c. which are dignities; for dignities shall be parcel of the name: but 35 H. 6. 4. those supra are only additions to the name, and not parcel. Br. Double, pl. 155. cites 21 E. 4. 71.

It was held pregnancy, viz. one, if there was such J. N. of D. another, if there was such J. N. of the county of N. another, if there was any J. N. yeoman; and therefore pregnancy: And per Hufley Ch.

*J. any of them by itself had been a good plea.* Br. Negative, pl. 44. cites 21 E. 4. 71. — S. P. Br. Brief, pl. 262. cites S. C. and pl. 387. cites 21 E. 4. 6.

10. *Replevin against A. B. and C. who imparl, and at the day A. and B. said that there was no such C. in rerum natura, judgment of the writ, & non allocatur; for it is after imparlance; contra before imparlance.* Quod nota Br. Brief, pl. 464. cites 4 H. 7. 17.

11. Debt upon a bond, and no such person as the plaintiff in being was pleaded; respond' ouster was awarded; for *after attorney made and entered on record, the defendant cannot plead such a plea.* 12 Mod. 539. Trin. 13 W. 3. Ball v. Smith.

## (B) Pleadings. Nul tiel Vill.

1. *PRcipe quod reddat in N. No such vill nor hamlet in the same county* is a good plea, and the writ shall abate. Quod nota Br. Brief, pl. 144. cites 38 E. 3. 34.

So in writ against M. late wife of Thomas Earl of A.

the defendant pleaded to the writ, because it is *brought in A. B. and C. and no such vill as C. in the same county*: And per Martin, it is a good plea to all the writ without answer to the residue, for it goes to all the writ. Br. Brief, pl. 6. cites 2 H. 6. 11.

*Contra*, if he says that there are two C's, and none without addition; for there is such a vill with addition, and the plaintiff shall recover by view of the jury: note the diversity. Br. Brief, pl. 6. cites 9 H. 6. 42. — Br. Waste, pl. 9. cites S. C. — S. P. Br. Additions, pl. 7. cites S. C. — But in writ in A. and B. it is a good plea to the writ that A. is a hamlet of B. and not a vill by itself: per Cur. But per Paston, he shall say in this case that no such vill. Ibid.

2. A. brought *trespass of land lying in Kingston*; it was objected, that there is *no such vill as Kingston without addition in the same county*; and no plea. Br. Brief, pl. 425. cites 11 H. 4. 61. — But 9 H. 6. no such vill is a good plea, by reason of the visne, but these words (without addition) make a diversity. Ibid.

S. P. Br. Additions, pl. 6. cites 9 H. 6. 28, 29. For if he be guilty in any Kingston

it is sufficient. — Ibid. cites 6 H. 7. 3. contra per Cur. — *So suing of superseas by J. N. naming him J. N. of D. it is no estoppel to say that there are two D.'s, and none without addition; for it stands with &c.* *Contra* to say that nul tiel vill; for this is contra: so of warrant of attorney; but yet the attorney had such liberty upon the diversity aforesaid. Br. Estoppel, pl. 82. cites 19 H. 6. 35 & 36.

[ 19 ] 3. *Nuper obiit in A. B. and C. in the isle of P. the tenant said, that no such vill as A. and B. in the isle, and non allocatur; for isle shall not have relation but to the last vill; but Brook says quod mirum! Br. Brief, pl. 157. cites 7 H. 6. 8.*

4. Trespafs in B. the defendant said that there are two B.'s in the same county, viz. *East-B. and West-B. absque hoc, that there is B. only; judgment of the writ; and per Cott. J. it is no plea in assise; for the plaintiff recovers by view of the jury; but a good plea in trespass, by reason of the visne. Br. Additions, pl. 25. cites 8 H. 6. 18.*

\* This is no issue for the defendant, that not known by the one name, and by the other, by which the defendant relin-

5. Trespafs against J. A. of B. S. the defendant said that he &c. was conversant and dwelling at B. H. and not at B. S. the plaintiff (said) that 'tis all one vill, and known by the one and by the other; the defendant said that, \* not known by the one and by the other; and held † no plea for the plaintiff, but shall say known by the name of B. S. only, or that there is no such vill as B. H. in the same county. Br. Maintenance de Brief, pl. 28. cites 8 H. 6. 32.

linquish'd his plea, and said that there was no such vill as B. S. nor hamlet nor lieu connu out of the vill and hamlet in the same county, *Prift*; Weston said there is such a vill as B. S. *Prift*; and the others e contra. Br. Issues joines, pl. 15. cites S. C. —† Wherefore the plaintiff said that he was of B. S. the day of the writ purchased. Br. Issues joines, pl. 15. cites S. C.

Trespafs at B. in the parish of S. No such vill as B. is a good plea by the common law, but not by the statute of additions. Br. Brief, pl. 404. cites 2 R. 3. 1.

6. No such vill as D. is a good plea in trespass. Br. Brief, pl. 13. cites 9 H. 6. 29. per Babb. — & 6. H. 7, 3. Accordingly per Cur.

7. Debt against J. N. of B. who at the exigent purchased supersedeas accordingly, and came and said that nul tiel vill as B. &c. by formal pleading and was not received by reason of the supersedeas which ettopp'd him; for he has affirm'd it; and per Paston he ought to have put protestation that nul tiel vill as B. and therefore he was awarded to answer over. *Quære* &c. Br. Estoppel. pl. 84. cites 19 H. 6. 44.

8. In annuity the count was, that the prior of M. in Southwark granted to the plaintiff in London such a day and year &c. and profert hic in curia the writing aforesaid, the date whereof is in the chapter-house of the said house: per Chocke; the defendant may say that no such vill, hamlet nor place known in L. where the plaintiff would falsely alledge that the house is in L. which in fact is in S. and not in L. Br. Count. pl. 60. cites 5 E. 4. 6.

9. Action against J. N. of D. where there is no such vill, hamlet nor place known &c. he may say that there is no such vill &c. or say that he was of S. absque hoc, that he was of D. and so in *precipe* quod reddat in D. he may say that no such vill, &c. or that they lie in S. and not in D. Per Littleton and Moyle. Br. Brief, pl. 365. cites 8 E. 4. 5.

10. In debt the defendant being named of D. said that there is no such vill nor hamlet called D. nor lieu conus out of vill and hamlet &c. Judgment of the writ; and by the Reporter, if there be a house in C. which is called D. and the defendant is named of it, he may plead as above, and there the plaintiff shall be compell'd to name him of C. which is the vill, and not of D. which is the lieu conus in the vill. But if such place be out of vill and hamlet, and known by name of D. then the plaintiff may name him of it. Br. Dette, pl. 171. cites 21 E. 4. 37.

For more of Nul tiel &c. see Fines (E a.), Record, Trespass, and other proper titles.

**\* Nufance.**

[ 20 ]  
\* Nufance  
is threefold;  
1. Publick  
or general.

**(A) Nufance Common. Who ought to reform Common Nufances.**

Fol. 137.

[1. **I** F a river be stopp'd to the common nufance of the country, and it has never been mounded [or cleansed], nor is it known who ought to mound [or cleanse] it of right, but A. has the lordship of one part by the river, and B. of the other part, and they have piscary in the same river, and 4 vills have their passage in the same river for their easement. The 4 vills in this case, who have common passage and easement of the same river, ought to mound [or cleanse] it: but if the 4 vills had not such easement and passage, then A. and B. who have the piscary there, ought to mound [or cleanse] it. 37 Aff. 10.]

2. Common.  
3. Private, or special.  
Publick is that which is to the nufance of the whole realm.  
Common is that which is to the common nufance of all passing by.  
Private is

that which is to a house or mill &c. 2 Inst. 406.  
The case was that the river had been stopp'd by flinging into it the bodies of persons dying of the plague.

**(B) Nufance. What is punishable.**

[1. **I** F a man lays logs of wood in a highway sparfim, and there suffers them to lie for 2 months, or other such time, tho' there be a passage with turnings and windings between the logs, yet this is a nufance punishable in a leet; for it is an impediment of the passage of the lieges of the King. Hill. 15 Ja. B. R. adjudged.]

[2. But

[2. *But in London, or other place, the unloading of billets in the high-street (which is the highway) before my house for my use, is not any nuisance for the necessity.* Hil. 15 Ja. B. R. agreed per Curiam.]

[3. *But if he suffers them to continue there for a long time after the unloading, it is a nuisance punishable.* Hil. 15 Ja. B. R. agreed per Curiam.]

1 Roll. 468.  
pl. 6. S. C.

[4. *If J. S. seised in fee of certain land adjoining to the highway, incroaches part of the highway and adds it to his franktenement, and dies, and his heir, to whom the land adjoining descends, continues the said incroachment, but does no new act, yet he may be indicted for the continuance of this nuisance; for the \* continuance of it is a new nuisance.* Mich. 11. Car. B. R. between *Lee* and *Boothby*. Per Curiam adjudged. This being moved in arrest of judgment, after a verdict at bar for the plaintiff. Intratur Trin. 11. Car. Rot. 1002.]

\* 2 Le. 103.  
Washbone  
v. Mordant  
— See Ros-  
well v.  
Prior.

5. *The suffering a publick bridge to be in decay is a publick nuisance.* Per Holt. Ch. J. 6 Mod. 255, 256. Mich. 3 Annæ. B. R. The *Q. v. Saintiff*.

[ 21 ]  
See (F)

### (C) General. *What shall be said a Nuisance.*

Cro. C. 184.  
S. C. Jo.  
221. S. C.  
S. C. cited  
2 Salk. 459.

\* Fol. 138.

Mich. 9  
W. 3. B. R.  
in case of  
Lodie v.  
Arnold.

† Hawk.  
Pl. C. 199.  
cap. 75.  
f. 9.

[1. **I**F a man hangs a gate upon a post, and shuts it with a catch upon another post *across the highway*, so that men cannot pass without opening of the gate, but by opening of it they may well pass, yet this is a common nuisance; for the gate in a way, made de \* novo, where *no gate was before*, is an impediment to the King's people in their passage; for some men are so feeble for age or infirmity, that they cannot open such gate, being on horseback, and some men have such horses that will not come quietly to a gate to open it; and they who go with horses laden, or with a cart, or who drive cattle, must go and open the gate when they come to it, and when they are doing this, their horses or cattle will run from them, and divers others inconveniencies: but gates which have been in highways *time out of mind* &c. are not any nuisance. Because it may be intended that they began by † composition when the owner of the land consented to the way, or put there upon an *ad quod damnum* brought, and then found no nuisance, or other such reasonable cause. P. 6 Car. B. R. between *James* and *Hayward*, adjudged upon a demurrer, per Curiam except Crook, who was against the judgment, and he cited 2 E. 4. 9. where it is admitted to be lawful to erect such gate.]

2. It was presented that one A. had inclosed a close, in which the people of B. had common, to the nuisance of the people of the vill, and because it is no nuisance unless done in a highway, or water, to the nuisance of a commonalty, and also upon this matter action is given by assise to the people of the vill, therefore the defendant went quit. Br. Nuisance, pl. 23. cites 27 E. 3. 6.

3. By

3. By 18 Car. 2. cap. 2. f. 1. Importation of cattle is a public nuisance, and shall be so adjudged.

8. 3. Nothing in this act shall hinder the importation of cattle from the Isle of Man, so as the number of the said cattle do not exceed 600 head yearly, and that they be of the breed of the Isle of Man, and be landed at the port of Chester.

4. 19 Car. 2. cap. 3. f. 3. enacts, That no building shall be erected within the cities and liberties of London and Westminster, but such as shall be pursuant to such rules of building, and with such materials as are therein after appointed; and according to such scantlings as are set down in a table in this act specified. And if any person shall build contrary, and be convicted by the oaths of 2 witnesses, before the Lord Mayor, or any 2 justices of peace for the city, the house so irregularly built shall be deem'd a common nuisance, and the builder shall enter into a recognizance for demolishing the same, or otherwise to amend the same; and in default of entering into such recognizance, the offender shall be committed to gaol till he shall have demolished, or otherwise amended the same; or else such irregular house shall be demolished by order of the Court of Aldermen.

5. A soapboilery in Woodstreet is a nuisance: so is a calenderman in Bread-street, try'd before Hale, Ch. J. So is a brew-house on Ludgate-hill; for that such trades ought not to be in the principal parts of the city, but in the out-skirts. 2 Show. 327. Mich. 35 Car. 2. B. R. The K. v. Pierce.

6. The owner of a glass-house at Lambeth was indicted for maintaining thereof, and was convicted and fin'd. 2 Salk. 458. Hill. 1 W. & M. B. R. The King and Queen v. Wilcox.

7. 9 and 10 W. 3. cap. 7. f. 1. enacts, That it shall not be lawful for any person to make, sell, or utter any squibs, rockets, serpents, or other fireworks; or any cases, moulds, or other implements for the making of any such fireworks; or for any person to permit any squibs &c. to be thrown or fired from his house or lodgings, or from any place thereto adjoining, into any publick street, highway, or passage; or for any person to throw or fire, or to be assisting in the throwing or firing of any squibs &c. in or into any publick street, house, shop, river, highway or passage; and every such offence shall be adjudged a common nuisance.

S. P. Vent.  
26. Pasch.  
21 Car. 2.  
B. R. Anon.

[ 22 ]

8. By 10 and 11 W. 3. cap. 17. f. 1. All lotteries are publick nuisances, and all patents for lotteries are void and against law.

9. 6 Geo. 1. cap. 18. f. 19. enacts, That all undertakings by publick subscriptions, relating to fisheries, and other affairs of trade, and acting as corporate bodies without charter, or under charters intended for other purposes, or under obsolete charters, and tending to the common grievance of his Majesty's subjects in their trade, and all publick subscriptions, receipts, payments, transfers, and all proceedings therein shall be deemed publick nuisances, and all offenders therein, being convicted upon information or indictment, in any of his Majesty's Courts of Record at Westminster, Edinburgh, or Dublin, shall be liable to such punishments, whereto persons convicted for publick nuisances, are by any laws of this realm liable; and shall moreover incur

*incur such farther pains &c. as were provided by the statute of provision and præmunire 16 R. 2. cap. 5.*

10. 5 Geo. 2. cap. 16. §. 8. enacts, That all buildings in the town of Blandford Forum shall be covered with lead, slate, or tile, and no perilous trade in respect of fire, viz. distiller, candlemaker, soap-maker, baker, or brewer, shall be used in the market-place; and all buildings which shall be covered or repair'd contrary to this act, and all houses built contrary to the direction of the Court, shall be adjudged publick nuisances; and all persons exercising the said trades contrary to this act, shall be deemed guilty of common nuisance.

(D) Nufance. *What Persons may make a Nufance.*  
[to whom, and to what;] and who shall have Affise for it.

3 P. 3 Le.  
13.—S. P.  
4 Le. 167.  
and 224.

[1. D Y. 8 El. 250. 88. *Lessee for life of land having a way over the land of S. from his land to a park which was in the hands of the lessor, and from the park to his land; S. stops the way. Per Curiam assise lies.*]

Tenant for  
life, in tail,  
or fee sim-  
ple, may have  
assise to redress  
a nuisance done  
to his freehold.

[2. But, Fitzh. Nat. Brev. 184. (G), *lessee for years shall not have assise of nuisance.*]  
F. N. B. (183) (1)——But lessee for years shall have assise only, because he has no freehold. Ibid. 184, 185. (G)

3. *Tenant for term de autre vie shall have writ of nuisance.*  
Br. Nufance, pl. 16. cites 4 E. 3.

4. Powell said, there could not be a nuisance to a market or franchise, but to a highway &c. but the Reporter adds a quære, 11 Mod. 67. Mich. 4 Annæ. Anon.

(E) *For what Things or Causes Assise of Nufance lies.*

3 Le. 13.  
S. P.—But  
if the stop-  
page be by  
a stranger,  
then only assise on the case lies.

[1. D Y. 8 Eliz. 250. 88. *A man had a way over the land of J. S. to his own land by prescription, J. S. stops the way, and assise lies, per Curiam.*]

2 Le. 181. cites 33 H. 6. 26. per Prisot.

[ 23 ] 2. If a man has a way to his franktenement, or to his common, which is stopp'd by a house made, or the like, assise of nuisance lies, but contra of a way to the church; per Herle. Br. Nufance, pl. 37. cites 4 E. 3.

3. It lies for levying of a goss to intercept the course of fish coming from the sea, usque ad gurgitem meam superiorem. F. N. B. 184. (A) in the notes there (b) cites 46 All. 9.

(F) \* Com-

(F) \* Common. *What Act or Thing shall be said a Common Nuisance.*

[1. IF the tenant of a manor who is a *free-tenant erects a dove-cote de novo without any licence* upon his tenement, and stores it with pigeons, and suffers them to fly out of the house, by which they devour the grain of the King's subjects throughout the country, yet this is not any common nuisance; for if it should be a common nuisance, no one could prescribe to have such house; for none can prescribe to make a nuisance. Also, if this should be a nuisance, it could not be done by any licence; for neither the lord of the manor, nor the King himself, shall give licence to any to commit a nuisance. Trin. 16 Ja. B. R. between *† Dewell* plaintiff, and *Saunders and Tedder* defendants. Adjudged in a trespass for taking of beasts for an amercement in the leet of the lord of Northumberland lord of the manor of *Istleworth Sion*, where the defendants in the right of the lord confessed the taking, and pleaded the matter, and averr'd it to be a common nuisance. Yet it was adjudged as above for the plaintiff upon a demurrer; because in law upon the special matter it is not any nuisance; and this was adjudged by the full consent of the whole Court. See the same case. Pasch. 16 Ja. B. R. 1. Contra Co. 5. *Boulston* 104. b. resolved.]

\* A common nuisance may be defin'd to be an offence against the public, either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires. Hawk. Pl. C. 197. cap. 75. f. 1. *† Poph.* 141. S. C. by the name of the E. of Northumberland's Case. In the Case of

*PRAT v. STEARN*, it was held by Coke Ch. J. that it was a common nuisance, and inquirable in a leet; but the other justices seemed to doubt thereof; but as to the matter they would not speak, because the presentment was not good. Cro. J. 382. Mich. 13 Jac. B. R.

[2. If a man makes candles in a vill, by which he causes a noisome scent to the inhabitants, yet this is not any nuisance; for the needfulness of them will dispense with the noisomeness of the smell. Pasch. 3 Ja. B. R. adjudged. *Rankett's Case*.]

Fol. 139. Hawk. Pl. C. 199. cap. 75.

f. 10. cites S. C. and says, that the reasonableness of this opinion seems justly to be questionable, because whatever necessity there may be that candles be made, it cannot be pretended necessary to make them in a town; and that the trade of a brewer is as necessary as that of a chandler; and yet it seems to be agreed, that a brewhouse erected in such an inconvenient place where the business cannot be carried on without incommoding greatly the neighbourhood, may be indicted as a common nuisance. — A presentment was at a leet for erecting a *glashouse*, and *Twilden J.* said, he had known an information adjudged against one for erecting a *brewhouse near Serjeant's Inn*; but it was insisted, that a man ought not to be punished for erecting any thing necessary for the exercise of his lawful trade; and it being answered, that it ought to be in convenient places, where it may not be a nuisance, the other justices doubted, and agreed, that it was unlawful only to erect such things near the King's palace. Vent. 26. Pasch. 21 Car. 2. B. R. Anon.

[3. If a man divides a mesuage in a town for poor people to inhabit, by which it will be more dangerous in time of infection of the plague, this is a common nuisance. Pasch. 10 Car. B. R. Such indictment of one *Brown* for dividing a mesuage in the vill of *Hertford* held good, and he put to plead to it, and then said,

Hawk. Pl. C. 199. cap. 75. f. 11. cites S. C.

said, that such indictments are frequent in London for dividing of messuages.]

Not only in respect of its endan-

4. *Keeping a bawdy-house* is a common nuisance. 1 Salk. 384. in *Cafe of the Queen v. Williams*, cites \*Hob. 95.

[ 24 ]

gering the publick peace by drawing together dissolute and debauch'd persons, but also in respect of its apparent tendency to corrupt the manners of both sexes by such an open profession of lewdness. Hawk. Pl. C. 196. cap. 74. cites Kitch. 11. 2. and 3 Inst. 205.—

\* This seems to be mis cited.

5. 13 & 14 Car. 2. cap. 18. f. 7. *All exportation of wool &c. in the said act mentioned, in the manner prohibited in the said act, is declared to be a common nuisance.* So of leather, by 14 Car. 2. cap. 7.

6. In 8 Car. 1. Noy pray'd a writ to prohibit a *bowling-alley erected near St. Dunstan's church*, and had it; cited per Hale Ch. J. Mod. 76. in *Jacob Hall's Cafe*.

7. The setting up a *stage for rope-dancing* is a nuisance in se, and in such case a prohibitory writ issued, and made the party pull down his stage. Per Holt Ch. J. 5 Mod. 142. cites it as *Jacob Hall's Cafe*.

But see Skin. 625. S. C. and the reasons there, why a playhouse

8. But a *playhouse* is no nuisance in itself, but only by consequence, as the acting plays draws the people and coaches and sharpers together. 5 Mod. 142. per Holt Ch. J. Mich. 7 W. 3. in *Cafe of the King v. Betterton*.

might be deem'd a nuisance in se.—Hawk. Pl. C. 198. cap. 75. f. 7. says it has been holden, that a common playhouse may be a nuisance if it *draws together such number of coaches or people &c. as prove generally inconvenient to the places adjacent*; and that it seems that they having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are *not nuisances in their own nature, but only become so by accident.* [*Quere tamen, and see Mr. Collier of the Immorality of the Stage.*]

9. *House standing on the highway, being ruinous and likely to fall down*, is a nuisance and indictable, and such indictment lies against the occupier, tho' he be but tenant at will. 1 Salk. 357. Trin. 2 Annæ B. R. *The Queen v. Watts*.

10. *Bringing a great ship of 300 ton into Billingsgate dock* is a publick nuisance. 6 Mod. 145. Pasch. 3 Annæ B. R. *The Queen v. Leich*.

11. If a man with a cart uses a common pack or horse-way so as to *plow it up*, and render it the less convenient for riders, the Court ask'd if this would not be a nuisance indictable. 6 Mod. 145. Pasch. 3 Annæ. *The Queen v. Leich*.

12. *Scolding often repeated to the disturbance of the neighbourhood* makes it a nuisance, and as such it always has been punishable in the leet, and therefore indictable. 6 Mod. 213. Trin. 3 Annæ B. R. *The Queen v. Foxby*.

S. P. 10 Mod. 336. per Cur. Trin. 2 Geo. 1.

13. *Common gaming-houses* are common nuisances. Hawk. Pl. C. 198. cap. 75. f. 6.

1. *The King v. Dixon & Ux.*

Noy. 103. is the Cafe of *KIND v.*

14. Serjeant Hawkins says, it seems certain, that it is a common nuisance to *divert part of a publick navigable river*, whereby the

the current of it is weaken'd and made unable to carry vessels of the same burthen as it could before. Hawk. Pl. C. 199. cap. 75. f. 11. cites Noy 103.

MAN-  
FIELD,  
that M. was  
fin'd 200l.

for diverting part of the river *Thames*, by which he weakened the current of the river to carry barges &c. towards London and other houses of the King upon that river. And such a thing cannot be done without an *ad quod damnum*; because that river is an *highway*. And also the doing it ought to be by the King's patent.

(F. 2.) *Private.* Pigeon Houses.

[1. *A Lord of a manor* by force of his right seigniorial may lawfully without any licence erect a *dovecote de novo* upon his land parcel of the manor and store it with pigeons, and suffer them to fly out and fly back again. For in the country it is received as a law; and a thing received in the country without precedent or authority to the contrary (as it seems) is to be taken for law; and it may stand with reason, that he shall have such prerogative as lord, because generally the pigeons feed in the fields next adjoining upon the lord and tenants. And when the lord departs with the tenements, the law hath saved to him his prerogatives, *rights and pre-eminencies which are due to him as lord*. Co. 5. *Boulston*, agreed. Tr. 16 Ja. B. R. between \* *Dewell* plaintiff and *Saunders* and *Tedder* defendants, agreed per Curiam.]

[ 25 ]

\* 2 Roll R.  
1. S. C. —  
Cro. J. 490.  
S. C.  
Mo. 453.  
S. C. —  
Cro. E.  
548. S. C.  
Hill. 39  
Eliz. C. B.  
by the name  
of Boulston  
v. Hardy. —  
Erecting of  
a dovecote  
by a free-  
holder who  
is not lord  
of the ma-

[2. But it seems that a tenant of a manor cannot lawfully erect a dovecote de novo upon his tenement without licence; for this is a right seigniorial appertaining to the lord only, who has a prerogative over his tenants, (and tho' it be not a common nuisance to erect such dovecote, yet it seems, that it is a particular nuisance for which the lord may have action upon the case or assise, as in case of erecting a mill to the nuisance of my mill). Co. 5. *Boulston* 104. b. resolved. Contra Trin. 16 Ja. B. R. between *Dewell* plaintiff and *Saunders* and *Tedder* defendants, resolved per Curiam, contra Papon. tit. Droit Seigniorial, fo. 793. and tit. de Servitut. fo. 827.]

nor, nor owner of the rectory, and replenishing it with doves is not any nuisance inquirable or punishable in a leet; 4 H. 6. 10. 27 Ass. pl. 6. 9 H. 4. 4. For nothing is inquirable there but what is a common nuisance to all people; and this is not so, but can be a nuisance to those only whose corn they eat, and therefore is no common nuisance; for if it were, neither the lord of the manor nor the parson could erect a dove-house more than any other freeholder; per Mountague, Crooke, Doderidge and Houghton; and therefore they held the opinion reported 5 Rep. 104. b. in this point to be no law, and no direct resolution in point of judgment. Cro. J. 491. Trin. 16 Jac. B. R. *Dewell v. Sanders*.

*Boulston's Case*, 5 Rep. 104. was only obiter and not agreeing with the reason of the principal; per Houghton J. quod fuit concessum per tot. Cur. and per Doderidge J. it cannot be a public nuisance; for that ought to be immediate or general. 1. Immediate it cannot be, for the erecting a dovecote cannot in itself be a nuisance. 2. It is not general but particular to the neighbouring inhabitants; and it has been allow'd on all sides, that a man may have a dovecote by prescription, which could not be if it were a nuisance, to which Mountague agreed. Poph. 141. Trin. 15 Jac. B. R. E. of Northumberland's Case.

3. P. And it is so far countenanced by the law, as to be demandable in a præcipe before any land whatsoever which is not built upon, and that the owner may justify the taking another's hawk which he shall find at his dove-house flying at his pigeons. Hawk. Pl. C. 198, 199. cap. 75. f. 8. And the Serjeant says, from hence it seems clearly to follow, that tho' a tenant who builds a dove-house without

without the lord's licence may *perhaps be liable to an action on the case at the suit of the lord*, whose prerogative is said to be inroad'd upon by such erection without his licence, yet he cannot be punish'd for it by a publick prosecution.

Lessee for years of parcel of a manor, the reversion to the Queen in fee erected a pigeon-house, and an information being brought in the Exchequer, Manwood Ch. B. and Gent. B. Popham

[3. *Rot. Parliamenti 4 H. 4. Numero 64.* The commons pray, that no man nor woman, nor parsons, nor vicars of holy church, nor no man or woman of religion henceforward have any pigeon-houses in any vills, if they and every of them have not *lands in the same vills to the value of 40s. per ann.* and if any people of such condition have any pigeon-houses at present, that they do not receive, nor suffer to be received nor harboured any pigeons in their pigeon-houses in time to come, *upon pain to pay to the King 100s.* And that the justices of peace in their *sessions*, stewards of lords and bailiffs of franchises, inquire in their *Court Leets* of the nuisance of such pigeons, and thereof make punishment by *amercement and by fine.*]

[Answer. *The King will advise.*]

attorney-general, and all the counsel at the bar, took the law to be, that the pigeon-house should be accounted as a common nuisance, and therefore an injunction was granted against the building it. For Manwood said, that *none can erect a dove-house, de novo, but the lord of the manor and parson of the church*, and in the old law it was inquirable in the Leet amongst common nuisances. And at the time of this motion Ld. Burghley came into Court, and he being the high treasurer said, that Plowden was of opinion that none but the Ld. of the manor or the parson of the church may erect a dove-house; and said, that he had heard Mountague Ch. J. say the same in a great assembly. Mo. 238. pl. 372. Pasch. 29 Eliz. Bond's Case.

[ 26 ] (G) Nuisance. *What shall be said a Private Nuisance.*

Fol. 140.

[1. I F the tenant of the land *plow the soil over which another has a way*, this is a nuisance to the way; for it is not so easy to him as it was before. 2 H. 4. 11.]

F. N. B. 184. (A) and in the notes there (b) it is said, Note, If the market be on the same day, it shall be intended

[2. If a man *levies a market or a fair to be held the same day that my fair or market is held in a vill which is next to my fair or market*, by which my fair or market is impair'd, this is a nuisance to my market or fair; for the *grant of the King* of such fairs or markets is *always \* with a clause* that it shall not be to the nuisance of another fair or market. † 22 H. 6. 14 b. 11 H. 4. 47 b. 41 E. 3. 24 b.]

a nuisance, but if it be *on another day* it shall not be so intended, and therefore it shall be put in *issue, whether it be a nuisance or not*, cites 11 H. 4. 5. in a scire facias for the King to repeal a patent. And adds, Note, a market was granted to be held in D. on Saturdays, 2 miles distant from C. where the King had a market on Tuesdays.

\* But if it be a nuisance, tho' it has not that clause, the 2d patent is void against him to whom it is a nuisance. F. N. B. 184. (A) in the notes there (b) cites 22 H. 6. 14.—And 2 inst. 406. says that the nisi sit ad nocumentum feriarum vicinarum in the grant of a fair is put but for example; for if it be ad aliquod damnum either of the King or Subject in any other thing, the fair shall be revok'd.—† Br. Action sur le Cafe, pl. 57. cites S. C.—2 Saund. 174.—Raym. 195. Yard v. Ford.—Vent. 98. S. C

F. N. B. 184. (A) in the notes there (b) at the end.—3 Lev. 221. &c. Trin. 1 Jac. 2. C. B. The King v. Sir Oliver Butler.

[3. So it shall be, tho' the King grant the last fair or market *without such clause*; for the King cannot take away my franktenement and I am bound to maintain my fair or market for the people. 22 H. 6, 15.]

[4. So if I have a *ferry by prescription*, if another erects another ferry upon the same river near to it, by which my ferry is impaired, this is a nuisance to me; for I am bound to sustain and repair the ferry for the ease of the lieges, otherwise I shall be grievously amerced. 22 H. 6. 14 b.]

[5. If a man has a sue, that is to say, a *spout above his house*, by which the water used to fall from his house; and another levies a house paramount the spout, so that the water cannot fall as it was wont, but falls upon the walls of the house, by which the timber of the house perishes, this is a nuisance. 18 E. 3. 22 b. Co. 9. 54. Baten.]

This case is cited 9 Rep. 54. a. Mich. 8 Jac. C. B. in Batten's Case.

[6. If a man stops a stream of water, which runs thro' his land, by which my land is surrounded, it is a nuisance to me. 9 E. 4. 35. Curia.]

[7. If I have a mill by prescription in my soil, and another erects a new mill upon his soil, by which the stream to my mill is streightened or stopped, or by which too great abundance of water comes to my mill, by which my mill is endamaged, so that my mill cannot grind so much as it was wont, this is a nuisance to my mill. 22 H. 6. 14.]

[8. If a course of water runs to my mill, and the tenant of the land where &c. diverts part of the course, so that my mill cannot grind one quarter where it was wont to grind ten quarters a day, *assise* lies, and not case. 2 H. 4. 11. b.]

[9. So if he puts stakes in his freehold in the water, by which I cannot have sufficient water to my mill, this is a nuisance to my mill. 9 E. 4. 35. per Curiam.]

[10. If I have a house by prescription upon my soil, and another erects a new house upon his own soil next adjoining, so near to my house that it stops the light of my house, this is a nuisance to my house; for the light is of great comfort and profit to men. 22 H. 6. 15. per Markham. Co. 9. 58. b. Resolved Bland's Case.]

See Stopping Lights.

[11. So if he erects his house upon his own soil so near my house, that it causes the rain to fall, and \* pour down upon my house, it is a nuisance. 22 H. 6. 15. per Markham.]

[ 27 ]  
(\* Orig. fund:rer.)

[12. So if a man erects a house, whereof part overhangs my house, it is a nuisance to my house; \* for the water must necessarily fall upon my house; & *cujus est solum ejus est usque ad celum*; and it takes away his air, and prevents him to exalt his house. 9 Co. Baten 54. adjudged.]

\* Fol. 141.

[13. If a limekiln be erected so near my house, that when it burns, the smoke of it so enters into the house, that none can inhabit there, this is a nuisance. Co. 9. 59. William Aldred's Case.]

[14. If a man has a water-course running in a fosse of the river up to his house for necessary uses, and a glover makes a limepit for calves-skins and sheep-skins so near to the said water-course, that the corruption of the limepit corrupts it, this is a nuisance. 13 H. 7. 26. Co. 9. Will. Adred. 59.]

[15. If a man erects in his own soil a house for hogs, so near

*my hall and parloir*, and there puts his hogs, so that by reason of the stink and unwholesome smells, I and my servants cannot continue in the hall and parloir, and other parts of my house, this is a nuisance; for good air is necessary for the life of men. Co. 9. Will. Aldred 57. b. adjudged.]

[16. The *stopping of wholesome air* is a nuisance as well as the stopping of the light. Co. 9. Will. Aldred 57. b. per Wray.]

[17. *But if a man stop my prospect*, no action lies for it; for this is not of necessity, but only for pleasure. Co. 9. Will. Aldred 57. per Wray.]

So of a  
brewhouse  
and privy  
in the said  
house, and  
burning fra-

[18. If a dyer erects a *dy-house* so near my house, by which I dare not dwell in this my house for the stink of the smoke and other nastiness, this is a nuisance. Co. 9. Will. Aldred 59. Book of Entries, Nuisance 406. b.]  
coal in the said brew-house, so that by the smoke, stench and unwholesome vapours coming from the said coal and privy, the plaintiff and his family cannot dwell in his house without danger of their health: adjudged by all the Judges on consideration for the plaintiff. Hutt. 135. Mich. 4 Car. Jones v. Powell.—Palm. 537. S. C. but no judgment.—But where there has been an *ancient brewhouse* time out of mind, *alibi* in Cheap-side or Fleet-street &c. this is not any nuisance, because it shall be supposed to be erected when there were no buildings near; *contra* if a brew-house should be now erected in any of the streets or trading places; this shall be a nuisance, and an action on the case lies for whomsoever shall receive any damage thereby; and accordingly in an action brought by one Robins a *laceman* in Bedford-street against a brewer for a nuisance from the brewhouse to the goods in his shop (it being a brewhouse of ten years standing) the jury gave for two years damages 60l. L. P. R. Nuisance 246. cites Trin. 8 W. 3. C. B. Robins's Case.

19. Winch J. said, that where one erected a *house so high that the wind was stopt from the windmills* in Finsbury Fields, it was adjudged that the house should be broken down. Winch 3. Pasch. 19 Jac. Anon.

Cro. J. 184.  
pl. 3. S. C.

20. If a private man has a way over the land of J. S. by prescription or grant, J. S. cannot make a *gate across the way*; per Jones J. Jo. 222. Pasch. 6. Car. B. R. in Case of James v. Hayward.

21. A private nuisance may be committed *4 manner of ways*, viz. *faciendo, non faciendo, permittendo, & non permittendo*. 2 Inst. 406. (d)

See Actions  
(L. c)

(H) Affise. In what Cases Affise lies. *Affise and not Case*.

S. P. As for  
levying,  
stopping &c.

[1. **FOR** acts of *misfeasance* affise lies. 11 H. 4. 83.]

but of *non-feasance*, as not scowring &c. action on the case lies. Br. Nuisance, pl. 9. cites 11 H. 4. 82. 83.—S. P. Br. Action sur le case, pl. 44. cites S. C.—Br. Nuisance, pl. 31. cites

[ 28 ] S. C.—And so it appears by the word (*levavit*) and those other words (*de facto alivimus*) in the beginning of the statute 13 E. 1. cap. 24. 2 Inst. 406.

Per Cur.  
and Coke,  
he may have  
either affise  
or case, tho'

[2. If *tenant* of the land *plows* all the land in which I have *common or pasture*, I shall have affise and not case. 2 H. 4. 11. b.]

it was moved in arrest of judgment that it appear'd that the plaintiff had a *franchise* in the land.  
Cro.

Cro. E. 198, 199; Mich. 32 & 33 Eliz. Leverett v. Townsend.—2 Le. 184. S. C.—3 Le. 263. S. R.

[3. If I have a way over the land of B. and he *plows my way*, affise lies, and not action upon the case. 2 H. 4. 11. adjudged.] Br. Action, sur case, pl. 29. cites S. C. per Markham.—Br. Nuisance, pl. 8. cites S. C.

[4. If the tenant of a wood *cuts all the wood in which I have common of estovers*, affise lies and not case. 2 H. 4. 11. b.]

[5. If a man levies a *fosse or hedge across my way*, affise lies and not case. \* 2 H. 4. 11. 11 H. 4. 26. 83. 21 E. 3. 2. b. 2 Aff. pl. 1.] \* Br. Action, sur case, pl. 29. cites S. C. per Mark-

ham. Br. Nuisance, pl. 8. cites S. C.—Adjudged that action of the case lies, tho' he may have affise. D. 250. b. Marg. pl. 88. says it was so agreed per tot. Cur. Pasch. 28 Eliz. B. Aston's Case.—Cro. E. 466. Pasch. 38 Eliz. S. C. adjudged, and Popham said that he had seen it so in experience several times. Alston v. Pamphyn.

[6. If a man levies a *fosse or hedge* where water runs by which my meadow is surrounded, affise lies. 11 H. 4. 26. 83.] If one makes a ditch &c. *cross a river which runs to my mill, tho' the ditch be made on his own soil*, it is in my election to have affise of novel disseisin or of nuisance. F. N. B. 183, 184. (O) in the notes (b) cites 32 Aff. 20.

[7. Affise does not lie for a *laches* of my doing [what I ought to do]. 11 H. 4. 83.] See (Q) pl. 1. in the notes there.

[8. *As* if he who ought to *repair a bridge* doth not do it, by which the bridge falls, no affise lies. 11 H. 4. 83.] See (Q) pl. 1. in the notes.

[9. *So* if a man who ought to *scour a ditch* doth not do it, by which my meadow is surrounded, no affise lies. 11 H. 4. 83.] An action on the case only lies; but if

he *stops it up*, an affise of nuisance lies; per Thirning. F. N. B. 183. (N) in the notes there (a) cites S. C.

[10. If a man has a *way from his meadow over the land of another*, he may have affise of nuisance for it. 20 Aff. 18.] F. N. B. 183. (N).

[11. *So* affise lies for a *way from his house* over the land of another. 20 Aff. 18.] F. N. B. 183. (N).

[12. A man shall not have affise of nuisance for a *way in gross*, but action upon the case or action of covenant; because it is *not annex'd to any* \* *franktenement* † 11 H. 4. 26. Curia. 21 E. 3. 2. b. 21 Aff. pl. 1. 20 Aff. 18. Brook. Chemin 7.] \* Fol. 142. Br. Nuisance, pl. 9. cites

11 H. 4. 25.—F. N. B. 183. (N) in the notes (a).—S. P. but if a *way appendant* be stopped, affise of nuisance lies. Br. Action, sur le case, pl. 39. cites † S. C.—S. P. if not appendant or appurtenant to his freehold; as if a man build a house over the way which I have to my house or to the church, I shall have an affise of nuisance. F. N. B. 184. (E).

[13. *So* if a man *grants a way over his land to such land or mill, where the grantee has nothing in the land or mill at the time, tho' he purchases it after*, yet he shall not have affise of this way; because it continues in gross in as much as he had not the land or mill to which the way ought to annex at the time of the grant made. (Quere if the grant be not void) 21 E. 3. \* 2. 6. 21 Aff. pl. 1.] \* It should be 21 E. 3. 2. b.

[14. *But* if a way be granted over land to me to my *franktenement*, [ 29 ]

\* It should be 21 E. 3. 2. b. *ment, assise lies of this way, tho' the grant be within time of memory; because it is annex'd to the franktenement.* 21 E. 3.

\* 26. 21 Aff. pl. 1.]

F. N. B. [15. *Assise lies for a way to the church from his house.* 20 183. (N) in Aff. 18. 33 H. 6. 26. the notes

there (a) says, that for a way to a church he shall only have a writ on his case, because he has no freehold in the church. cites 4 E. 3. Nuisance 8. But that it seems contra as to a way to a church which one has *ratione tenuræ*. And adds, *Quere* if not an action on the case, or a writ of assise at his election.

F. N. B. [16. If a man *straitens my way*, and does not stop it totally; 183. (N) no assise lies, but action upon the case. 33 H. 6. 26.] in the notes

there (a) cites S. C.—But if it be all stopp'd, assise of nuisance lies. Br. Nuisance, pl. 3. cites S. C.—Pl. 13. cites 14 H. 8. 31. S. P. but if he stops it in toto, then assise lies.—S. P. per tot. Cur. And so of a river or course of water, and the like. Br. Nuisance, pl. 13. cites 14 H. 8. 31.—S. P. Br. Action sur le case, pl. 12. cites 33 H. 6. 26.—So Ibid. pl. 64, cites 14 H. 8. 31. per all the justices.

F. N. B. [17. If the *tenant of the land stops my way appertaining to my* 183. (N) *franktenement*, an assise lies; but otherwise it is if a *stranger* stops the notes it, for there no assise lies, but action upon the case. 33 H. 6. 26.] there cites

S. C. and says, that it seems that in an assise, or on a quod permittat, you need only name the tenant of the freehold where the stoppage is.—S. P. per Priot. Br. Action sur le Case, pl. 12. cites S. C.—F. N. B. 183. (N) in the notes there at the end. S. P. cites 22 H. 6. 15.—S. P. per Markham. Br. Action sur le Case, pl. 57. cites 22 H. 6. 14.

[18. If a man *grants to another to have annual ferne and straw in his house throughout the year in winter for two cows for life*, if the grantee be disseised of it, he may have an assise. 4 E. 4. 2. b.]

Br. Nuisance, 19. *A man leases his land for years*, yet he himself shall have pl. 35. cites assise of nuisance; quod nota; nevertheless, it seems there, that S. C. and that it seems he shall not recover damages. Br. Assise, pl. 457. cites 23 H. 3. it lies only to remove and Fitzh. Assise, 437. the nuisance.—But his lessee for years shall have an action on the case only, and not an assise.— 3 Le. 13. pl. 31. 18 Eliz. C. B. Anon.

Assise of nuisance, or action on the case lies for diverting *majorum partem cursus aque* 20. If a man turns *aside a water-course*, so that the mill of his neighbour cannot grind, assise lies *de libero tenemento*, if the mill and misturning are in one and the same vill; but if they are in two vills, then assise of nuisance in the mill where the misturning was. Nevertheless, if he \* *straitens the water*, so that the mill cannot grind so readily as it was wont, then it seems that assise of nuisance or action upon the case lies. Br. Assise, 146. cites 9 Aff. 19.

there (a) cites D. 284.—\* If a man has a *water-course* to his mill, and part is turned into another course, so that the mill which before ground 10 quarters a day, can grind now but five quarters, trespass lies upon the case, per Rede; but Markham denied it, and said, that assise lies. As *quo minus* lies where a man cuts all the wood where I have cisterns. Br. Action sur le case, pl. 29. cites 2 H. 4. 11.

Br. Assise, 21. Assise of nuisance was brought of *straitning the way which* pl. 62. cites the plaintiff ought to have to his mill, and the defendant alleged unity S. C.

unity of possession of the land where &c. and of the mill, in one *W.* judgment &c. within time of memory; and the plaintiff said, that after this *W.* had two daughters, and died seised, and the mill was allotted to the one in partition, and the land to the other, and the way was reserv'd to her who had the mill &c. And there it was agreed, that the reservation is good of this, or of rent-charge upon partition without deed, and the assise awarded; quod nota; and so see that it seems appendant upon the reservation, for otherwise assise does not lie; but this seems to be of assise of novel disseisin, but otherwise it may be of assise of nufance. Br. Nufance, pl. 11. cites 21 E. 3. 2.

22. If a man levies a market to the nufance of my market, I shall have assise of nufance; per Hank. Br. Nufance, pl. 10. cites 11 H. 4. 47.

And whether the market be by prescription, or by

letters patents, I need not tarry till I have avoided the letters patents of the later market by course of law, but may have an assise of nufance. 2 Inst. 406. — I may have assise of nufance, or action upon the case. Br. Action sur le case, pl. 57. cites 22 H. 6. 14. per Paston, which Newton agreed.

23. And of disturbance of persons coming to the market, by which I lose toll, action upon the case lies. Ibid.

24. Case does not lie, nor an assise of nufance where it is *damnum absque injuria*, as for erecting a mill near my mill, whereby I lose the custom &c. of the inhabitants. Note, F. N. B. 184. (A) in the notes there (a) cites 22 H. 6. 14. — So for setting up a grammar school. Ibid. cites 11 H. 4. 47.

25. If I have a fair or \* ferry over the water, and another levies another fair or ferry to my nufance, I shall have assise of nufance, or action upon the case; per Paston, quod Newton concessit. Br. Action sur le case, pl. 57. cites 22 H. 6. 14.

\* But per Markham, the ferry does not impair his franktenement.

ment, and therefore action upon the case lies. Br. Action sur le case, pl. 57. cites 22 H. 6. 14.

26. And if a man levies a house, and stops the light of my house, or causes the rain to fall upon my house, or other thing which impairs my franktenement, I shall have assise of nufance; per Markham. Br. Action sur le case, pl. 57. cites 22 H. 6. 14.

27. Action upon the case was brought, because where he has a mill in T. time out of mind, the water was running from the vill of A. to his mill, there has the defendant made a trench to let the water out of its course; and notwithstanding the plaintiff might have assise of nufance, yet by the opinion of the Court the action well lies. Br. Action sur le case, pl. 71. cites 21 H. 7. 30.

28. Where a man stops my conduit, I shall have assise of nufance; per Row. Br. Nufance, pl. 13. cites 14 H. 8. 31.

S. P. Br. Action sur le case, pl.

64. cites S. C. But action upon the case lies against S. where the river of S. have run by the vill of N. and he has levied a mill, so that the river does not run as well as it was wont; and has made flood-gates, so that the river surrounded the meadow.

29. Case was brought for stopping of a way over the land of the defendant, 3 Le. 13. D 3. pl. 31. and

4 Le. 167. and 224. seem to be S. C.

\* D. 250. b. Marg. pl. 88. says, that this case was denied to be law. Pasch. 8 Eliz. B. in Aston's Case.

*defendant, viz. from the house of the plaintiff to a park, and from the park to the house again, at all times of the year, for all carriages by prescription, and it appears that the plaintiff had a lease for life in the house, but not in the park as his lessor had; and the prescription was traversed and found for the plaintiff by verdict; but judgment was arrested, because the plaintiff ought to have had \* nuisance and not case. D. 250. b. pl. 88. Pasch. 8 Eliz. Yevance v. Holcombe.*

D. 250. b. Marg. pl. 88. says, that many precedents

were shewn by the clerks where judgment had been given that case lies; for that it is at the \* election of the plaintiff to have the one or the other, and cites Mich. 28 & 29 Eliz. B. R. Villet v. Parkhurst.——And adds, that according to this judgment the law is clearly taken at this day. And that it was adjudged contra, and this case denied to be law. Mich. 8 Jac. B. R. Pollard v. Calies.

† \* S. P. Cro. J. 198, 199. Mich. 32 & 33 Eliz. B. R. Leveret v. Townsend.——S. C. 3 Le. 263. and 2 Le. 184.

Where the *plaintiff counted that he was seised*, exception was taken that the action ought to have been assise, and not case, and for that and other exceptions it was adjudged that the plaintiff nil capiat per breve. Mo. 449. Pasch. 38 Eliz. C. B. Belwick v. Comden.

[ 31 ] A. counts that he was seised in fee of a house and land, to which he had common appurtenant in such a place, and that he and all those whose &c. have had a way from the place in which &c. and that *defendant totaliter had stopped up* his way whereby he could not come to his common, but *altogether left the use thereof &c.* It was insisted in error, that it should have been assise and not case, in regard that the *inheritance is in question*, and so upon the first motion held diverse of the justices and barons, but upon consideration had of D. 250. b. 11 H. 4. 2 H. 4. and others, they resolved that the action was well brought; for that the plaintiff had election to bring the one or the other; for tho' a difference had been taken *where the way is wholly stopp'd up*, so that he loses the use thereof altogether, and thereby his common, that there an assise shall lie, but where it is stop't *but in part*, that case lies, and not assise, they conceived it not to be any difference; for he may elect to have the one or the other action, especially as this case is, where it *appears not that the stopping was made by him who is the tenant of the freehold*, but it might be done by a stranger who has nothing to do with the land, or by one who has only a term therein. And therefore resolved that the action was well brought, and affirm'd the judgment. Cro. E. 845. Trin. 43 Eliz. in Cam. Scacc. Cantrell v. Church.

In an action upon the case, the *plaintiff declares that he was seised in fee of Black-acre, and that he had a way to it by such and such a gate &c. and that the defendant had fastened the gate with a lock.* And upon not guilty it was found for the plaintiff; and now moved in arrest of judgment, and adjudged that that action of the case is well brought, and that he is not put to an assise. 1st. Because it does not appear if the defendant claims a franktenement in the land, by which &c. for it may be a stranger's, and then the assise does not lie against him. 2d. That is only a disturbance of a way pro tempore, of which a man cannot have an assise; as where the party meddles with the franktenement, as in digging or making of a ditch. Noy. 112. Trin. 2 Jac. C. B. GAMFORD v. NIGHTINGALE, cites 2 H. 4. 11. 14 H. 8. 31. Dyer 319. b.

31. But if the *plaintiff or defendant had but an estate for years &c.* then an action on the case would lie, and not an assise, 3 Le. 13. pl. 31. ut supra.

### (I) Assise and Not Trespass.

[1. *WHERE a man may have assise of nuisance for nuisance to his way, he shall not have trespass; because he ought to have the most real action.* 19 H. 6. 29.]

[2. If

[2. If I have a *water-course* over my own land, and a *stranger* comes upon my land, and makes a trench, by which he turns the water, I may have an assise of nuisance against him, tho' I might have trespass or assise of novel disseisin. 32 Aff. 2. adjudged. Vide contra 13 H. 7. 26. b. Curia.]

3. Where the defendant makes a trench in the soil of the plaintiff to the nuisance of other land of the same plaintiff, yet assise of nuisance lies, and he shall not be drove to assise of the land nor to trespass. Br. Nuisance, pl. 25. cites 32 E. 3. 8.

(I. 2) Actions. What. \* *Quod permittat* for whom.  
In what Cases and Pleadings.

See Actions  
(N. b.)—  
*Quod permittat*.

1. *BEfore the statute of W. 2. 24.* He to whom nuisance was done was driven to his *quod permittat* (which was a writ of right in its nature, wherein was great delay) against the alienee; and this was because there was no writ of assise of nuisance in the register, but what supposed that the tenant in the assise levavit, which is remedied by this act. 2 Inst. 405.

\* The diversity between a *quod permittat*, or an assise for a nuisance, and an action upon the

case for the nuisance is, that a *quod permittat* and a writ of assise are to *abate the nuisance*; but an action on the case is only to *recover damages*; therefore, tho' the nuisance be removed, the plaintiff is intitled to his damages which accrued before. 2 L. P. R. 244.

+ S. P. And yet he who is but *lessee for life* shall have and maintain it. 2 Lutw. 1588. in the Case of *Shalmer v. Pulteney*.—Cites 4 E. 3. 45.

2. And before that statute no *quod permittat* did lie for a parson of a church of a nuisance done in the time of his predecessor against the disseisor or his heir, being an injury and wrong; and the reason was, that there was no writ in the register in the case. 2 Inst. 406, 407. [ 32 ]

3. In case upon a nuisance, the plaintiff counted that he was seised of two acres of land such a day, and that the defendant erected and exalted &c. & *custodivit & manutenuit, & adhuc custodit & manutenet &c.* by which the river overflow'd the lands of the plaintiff. It was objected, that *custodire & manutenerere* are not sufficient words of tort, and ought to have been that he levied or repaired de novo, or *exaltavit &c.* Because the original offence is before the plaintiff's title to the land for any thing that appears in the case. And that in this case, *quod permittat* lies by the statute, and not action upon the case; for by *tort done to a possession, which possession is transferred to another*, the other had no remedy by the common law, for which reason the statute gave a *quod permittat*; and therefore the justices awarded *quod nihil capiat per breve*. Mo. 449, 450. Pasch. 38 Eliz. C. B. *Beswick v. Comden*.

S. C. cited 5 Rep. 101. b. in *PEN-RODDOCK'S* Case, but cites it as in Hill. 35 Eliz.

4. A. built a house so that it over-hang'd the house of B. three feet. Afterwards A. convey'd his house to C. and B. convey'd his house to D. who brought a *quod permittat*. And it was resolved that the dropping of the water in the time of the scoffee

This case was afterwards affirmed in error brought in B. R.

5 Rep. 101. is a *new tort*, and by the permitting the continuance of it, and not reforming it upon request, a quod permittat lies against the feoffee of A. and D. shall recover damages. But without request it lies not against the feoffee, tho' it lies against him who did the tort without any request. 5 Rep. 100. b. 101. a. Trin. 40 Eliz. C. B. Penruddock's Case.—Als. Clark v. Penruddock.

quod permittat in this case, before he has requested C. to abate it. For C. is a stranger to the tort.

5. In this writ there is *no need to shew how he has the estate* (of the last person that was seised in fee of both estates) in the house to which the nufance was done. 2 Lutw. 1588. in the Case of SHALMER v. PULTENEY, cites 9 Rep. 53. Batten's Case.

Ibid. cites F. N. B. 184. [B] that it lies de fabrica, which the Court held as uncertain as ædificium.

6. A quod permittat was brought prosterne *quedam ædificia ad nocumentum* &c. And the Court held, that a quod permittat will lie de ædificio. And the Court held, that whether the nufance was by the tenant or a stranger, the plaintiff may maintain a quod permittat; for it is the same prejudice to the plaintiff. 2 Salk. 458. Mich. 8 W. 3. C. B. Palmer v. Poultney.

### (K) Who shall have it.

S. P. For of nufance before his interest he shall not have assise; for the making of the thing is the dissension and cause of nufance. Br. Nufance, pl. 16. cites 4 E. 3. 3.—But if it was used and made in the time of another, and after is discontinued, and after renewed in the time of another, as the heir or lessee for life; there per Herle J. the heir or lessee shall have the assise. Ibid.

[1. IF a man stops my way by a ditch or hedge, and afterwards I die, and my heir finds the way open and uses it, if he be disturbed he may have an assise; because this is a *new nufance*. 4 Ass. 3. per Herle.]

S. P. Tho' it was moved in arrest of judgment, because the nufance is supposed to be done before the plaintiff's title commenced, yet Gawdy held the declaration good; for an action on the case declares the whole matter, so that it is not material when the nufance was erected; for be that is hurt by it shall have an action, which Fenner agreed; for it may be the nufance was not by the stopping till the running of the water, and the action being brought as the truth is, is well brought, and Wray being absent, they commanded judgment to be entered, if nothing said to the contrary. Cro. E. 191. S. C.

[2. If a man be seised of certain land adjoining to a certain river, and another stops the river with certain loads of earth, and the tenant of the said land adjoining leases the land to another for years, and after the stoppage aforesaid of the said river continues, by which the land of the lessee is surrounded; the lessee shall have action upon the case against him for it. For tho' the stoppage was before his time, yet the continuance after was a tort and damage to the lessee; for by this his land was surrounded. Mich. 32 & 33 Eliz. B. R. adjudged between Westburn and Mordant.]

(K. 2) *Against whom it lies.*

1. N Uſance ſhall be brought *againſt tenant of the franktenu-ment.* Br. Nuſance, pl. 6. cites 50 E. 3. 11.

2. If a man has a way over the land of three ſeveral tenants, and the one ſtops the way, *aſſiſe of nuſance ſhall be againſt all,* per Priſot, but Danby *contra*; for it ſhall be againſt him only who did it; but per Priſot all the *tertenants ſhall be named.* Br. Nuſance, pl. 3. cites 33 H. 6. 26.

(L) *Against whom it lies. Against the Heir.*

[1. I F a man builds a houſe acroſs a trench, which is to reſreſh a *fiſh-pool*, in deterioration of the fiſh, and dies, *aſſiſe of nuſance* lies againſt the heir if he reſuſes to reform it. 17 E. 3. 9. b.] Vide (M) pl. 6.

3. 9. b.]

[2. So if the anceſtor levies a longain near the pool, by the \* food of which the *fiſh periſh* in great number, *aſſiſe* lies againſt the heir if he reſuſes to reform it. 17 E. 3. 9. b.] \* Orig. Pa-voir. The year-book ſhews it to mean (food).

[3. If a man builds a kiln to burn chalk to the nuſance of my houſe and trees next adjoining, and after *diſcontinues the uſe of it*, and then dies, and his heir *renews the uſe of it* again, this is a new nuſance made by the heir, and a *quod permittat* lies againſt him for it. 4 Aſſ. 3. But otherwiſe it would be, if the kiln never was diſcontinued in the life of the father, but had been always uſed, and the heir continued the uſe in the ſame manner; for there no *quod permittat* lies againſt him. 4 Aſſ. 3.]

Fol. 143.

4. If a man builds any thing which is a nuſance to the freehold of another, and dies, he to whoſe nuſance it is, ſhall have a writ of *quod permittat* againſt his heir that did the nuſance. F. N. B. 124. (H).

(M) [Against whom it lies.] *Feeſſee.*

[1. I F a man builds a houſe croſs a trench which runs into my *fiſh-pool*, and after aliens it, *aſſiſe* lies againſt feeſſee if he reſuſes to amend it. 17 E. 3. 9. b. It ſeems it is to be intended of a feeſſee.]

[2. So if a man levies a longain ſo near to a trench which runs to my pool, that my *fiſh periſh of the food* [brought in thereby] and afterwards aliens the longain, *aſſiſe* lies againſt the alienee, if he reſuſes to amend it. 17 E. 3. 9. b. It ſeems intended an alienee.] See (L) pl. 3. in the notes.

[3. If a man ſtops my way by a foſſe or hedge, and after aliens the land, and after I find the way open, and enter and uſe it, if the feeſſee [ 34 ]

feoffee disturbs me, I may have an assise of nuisance. 4 Aff. 3: per Herle.]

4. 13 Ed. 1. cap. 24. enacts, That the party grieved shall have a writ as well against the alienee of a house, wall &c. which is a nuisance, as against him that erected it.

The reason why at common law assise of nuisance lay not against him who levied the nuisance, and him to whom the tenement was transferr'd, was, because there was not found any writ of assise of nuisance in the register but what supposed that the tenants in the assise levaverunt; and this cannot be said when the tenement is transferr'd to another; for he did not levy the nuisance, but the other only; and now this statute gave writ of assise in such case; and this statute extends only to assise of nuisance against him who did the nuisance and his alienee, 9 Rep. 55. a. Mich. 8 Jac. C. B. in Baten's Case. — It does not extend to the alienee of the alienee. 2 Lutw. 1588. cites S. C. — It seems by the statute that the action shall be brought against him that did the tort and the tenants after the alienation. F. N. B. 124 (H) [290] in the notes (a).

5. There is a writ in the register for the feoffee of him to whom the nuisance was done against the feoffee of him by whom it was done, to compel him to reform the nuisance. F. N. B. 124. (H) — But this writ is not given by the statute, but may sue &c. by the statute W. 2. in casu consimili &c. cap. 24. Ibid. 125.

Gro. E.  
402. Trin.  
37. Eliz.  
B. R. Vide  
(N. 2)

6. Action on the case was brought, quare malitiose custodivit quandam ripam, by which the water of the river surrounded his land; and it appeared that the bank was levied before by the feoffor of the defendant; and adjudged that the action lies for the continuance against the feoffee, and that it would lie against an heir in such case. Mo. 353. Hill. 6 Eliz. Bewick v. Combden.

S. C. cited  
Cro. E.  
402. in  
S. C. —  
and S. C.  
of Rolfe v.  
Rolfe, cited  
5 Rep. 101.  
in Penruddock's Case, and that it was brought by the heir of the one against the heir of the other; and that it was adjudged that the action lay, because the defendant upon request made to him by the plaintiff did not reform the nuisance made by his father, but permitted it to continue to the prejudice and damage of the plaintiff, but cites it as Mich. 24 & 25 Eliz. B. R.

7. One house was built so near another house, that the one annoyed the other with continual dropping, and afterwards feoffment was made of the new house; and it was adjudged that action on the case would lie against the feoffee for the continuance. Mo. 353. pl. 475. in Case of Bewick v. Combden, cites Pasch. 25 Eliz. Rolfe v. Rolfe.

8. If one levies a bank in a river, by which part of my land is surrounded, and afterwards I make a feoffment of my land to J. S. and afterwards another part is surrounded by reason of that bank, he shall have assise of nuisance. Per Popham. Quod fuit concessum. Cro. E. 403. Trin. 37 Eliz. B. R. in Case of Bewick v. Cunden.

9. If the wrong-doer reforms the nuisance before the assise or quod permittat brought, the action lies not; howbeit if the party had any particular loss by the nuisance, he shall recover damages for the same in an action on the case, ne querentes decederent a curia sine remedio. 2 Inst. 406.

2 Salk. 460.  
Hill. 13. W.  
3. B. R. S. C.

10. Defendant being possessed for years of a piece of ground adjoining to an ancient messuage with ancient lights, whereof the plaintiff was possessed for years, did erect a house thereupon, whereby

whereby the plaintiff's ſaid lights were ſtopp'd, for which the plaintiff brought a former action, and recover'd damages; after which the defendant grants over the ground with the nuſance to another reſerving rent; and after the plaintiff brings this action againſt the defendant for the continuance of that nuſance; and adjudged well brought, and would have been good againſt either. But if this action here were brought by an alienee of the land, to which the nuſance was, againſt the ereſtor, and the ereſtion had been before any eſtate in the alienee, the queſtion would have been greater, becauſe the ereſtor never did any wrong to the alienee: but here they agreed to give judgment for the plaintiff. 12 Mod. 635. 640. Hill. 13 W. 3. in Caſe of Roſwell v. Prior,

(M. 2) *Pleadings in Actions againſt the Heir, Feoffee &c.* [ 35 ]  
See Actions (N. b) &c.

1. 13 Ed. *ENactis* that the party griev'd ſhall have a writ as well againſt the alienee of a houſe, wall &c. which is a nuſance as againſt him that ereſted it; and when the writ ſhall be againſt the party himſelf that levied the nuſance, it ſhall be in this form, (viz.) *Queſtus eſt nobis A. quod D. injuſte &c. levavit domum, murum muratum &c. & alia quæ ſunt ad nocumentum &c. and if ſuch writ be ſued againſt the alienee of ſuch nuſance, it ſhall be ſaid Queſtus eſt nobis A. quod B. &c. levaverunt &c.*

Before this act an aſſiſe of nuſance lay not againſt him that levied the nuſance, and againſt his alienee, ſo as by the alienation of the wronge. 2 Inſt. 405.

doer the aſſiſe of nuſance failed.

2. The alienee may have aid of him in reverſion or remainder. F. N. B. 124. (H) [290] in the notes (a) but adds a quære, and cites 30 E. 3. 26. 4 Aff. 3. Reg. 194.

(N) Nuſance. *How it ſhall be brought.*

[1. *A* N aſſiſe lies quare arctavit viam. 48 Aff. 4. 48 E. 3. 28. 11 H. 4. 26.]  
[2. An aſſiſe lies quare arctavit curſum aquæ. 48 Aff. 4. \* 48 E. 3. 27. b.]  
[3. If a man ſtraightens the courſe of the water to my mill, ſo that the water cannot deliver itſelf ſo readily as it uſed to do, an aſſiſe quare arctavit curſum aquæ lies. 48 Aff. 4.]

See (F) pl. 6. — Br. Nuſance, pl. 7. cites S. C.  
Br. Nuſance. pl. 7. cites 48 E. 3. 27. per Perſey.

(N. 2) *Pleadings in general in Actions, and what recovered.*

1. *I*F nuſance be done, and the party abates the nuſance, he ſhall not have treſpaſs; for he might have recovered damages in aſſiſe if he had taken the aſſiſe, and now the aſſiſe is gone.

But where the tenant of the land reforms the

nuisance  
pending the  
affixe, yet  
the plaintiff shall recover damages. Ibid.

gone. Br. Action Sur Case, pl. 29. cites 2 H. 4. 11. per Thurning.

4 Le. 167.  
224. S. R.

2. In pleading of the stopping a way the word *obstupavit* is sufficient in itself *without shewing the special matter how*, as by setting up a gate, hedge or ditch &c. for it implies a nuisance continued, and not a personal disturbance, and amounts to *obstruxit*, as a forestaller, or saying to the plaintiff upon the land &c. that he should not go there or use that way; for in such cases an action on the case lies: but as to any local or real disturbances, *obstupavit* amounts to *obstruxit*. 3 Le. 13. pl. 31. [Mich.] 8 Eliz. C. B. Anon.

3. Tho' in the declaration is set down the day and year of the obstruction, yet it shall not be intended that it continued the same day only, the words being further, by which he was disturbed of his way and yet is; and so the continuance of the disturbance is alleged. And of this opinion was the whole Court. 3 Le. 13. pl. 31. [Mich.] 8 Eliz. C. B. Anon.

[ 36 ] 4. Plaintiff declared of a prescription *habere viam tam pedestrem quam equestrem pro omnibus & omnimodis carriagiis*; this prescription is not good for a cartway; for every prescription is *stricti juris*. This being said to the Court by Leonard prothonotary, Dyer Ch. J. said that it was well observed, and that he conceived the law to be so; and that therefore it is good to prescribe *habere viam pro omnibus carriagiis* generally, *without speaking of horseway, or cartway, or other way &c.* 3 Le. 13. pl. 31. [Mich.] 8 Eliz. C. B. Anon.

\* Noy. 68.  
S. C. reports, that in a quod permittat in nuisance the pleading was quod levavit quendam molem (Anglice) a bay, by which &c. the water-course of his mill is stoppt; and the Court said that the writ should abate; be-

5. The count in action on the case was, that 20 April 34 Eliz. the plaintiff was seized of 2 acres of wood in G. adjoining to the river of H. and that the defendant the same day quendam molem nuper ante by the defendant erected and exalted super & trans rivulum prædict. & semper postea till the day of the writ purchased, custodiuit & manutenuit & adhuc custodit & manutenet, by which the river overflowed the lands of the plaintiff: and exceptions were taken, among which one was, that *custodire & manutenerere* are not sufficient words of tort; and that therefore the words ought to have been, that he levied or repair'd de novo, or exaltavit molem prædict. because the original offence is before the plaintiff's title to the land for any thing which appears in the case; and judgment was that the plaintiff nil capiat per breve. Mo. 449. Pasch. 38 Eliz. C. B. Beswick v. Comdon.

because moles is an equivocal term, and is not proper for a brook or bay.—Cro. E. 520. S. C. in B. R. Mich. 38 and 39 Eliz. reports that it was resolv'd upon a demurrer, that there is no offence laid to be committed by the defendant; for the plaintiff alleges that he kept and maintained a bank, which is that he kept it as he found it, and that is not any offence done by him; for he did not do any thing; and if it was a nuisance before his time, it is not any offence in him to keep it. But the plaintiff is to have his remedy by quod permittat, and therefore this case differs from 4 Aff. 3. for there the using was a new nuisance, but it is not so here: wherefore adjudged for the defendant.

6. In an *assise of nuisance* brought because *levavit domum ad nocumentum of his mill*, by which the wind is stopped to come at his mill, so that he cannot grind &c. and the jury find that the defendant has erected a house de novo, and that only 2 yards of the top of the house is to the nuisance: this is found for the plaintiff; for here the declaration is not satisfy'd but only abridg'd; and the judgment shall be that the 2 yards shall be dejected. 2 Roll. 704. pl. 23. cites M. 11. Ja. B. between GOODMAN and GORE, and others adjudged.

(O) *Quare divertit Cursum Aquæ.*

- [1. IF by a trench or other thing done, the water holds its course in part where its course was not before (tho' not in all) yet assise lies *quare divertit cursum aquæ*. \* 48 E. 3. 27. b. Curia. 48 Aff. 4. Quære Dy. 8 El. 248. 80.] \* Br. Nuisance, pl. 7. cites S. C.
- [2. If by putting of piles and stakes, and for default of cleansing the water is by so much straightned that it cannot run so readily as before, assise lies *quare divertit cursum aquæ*. \* 48 E. 3. 27. b. dubitatur. 48 Aff. 4. dubitatur.] \* Br. Nuisance, pl. 7. cites S. C.
- [3. If a man levies a house a-cross a course of water which runs to my mill, the writ ought to be *quare divertit cursum aquæ &c.* and not *quare levavit domum ad nocumentum liberi tenementi*. 11 H. 4. 26. dubitatur.] F. N. B. (E) in the notes there (c) at the end cites S. C.

(P) *Obstruxit.*

[ 37 ]

- [1. ASSISE lies *quare obstruxit quandam viam*. 48 E. 3. 28. 48 Aff. 4.] As to any local or real disturbance C. B. Anon.
- obstruxit* amounts to *obstruxit*. 3 Le. 13. pl. 31. [Mich.] 8 El.
- [2. This writ lies when he cannot have his way nor any part of it. 11 H. 4. 26.]
- [3. If a way be stop't in part, and part not, but the better part is stop't, so that there is not any passage, assise lies *quare obstruxit viam*. 48 E. 3. 28.]
- [4. If a way to go with carts or carriages be stop't with a fosse to the middle of the way, so that he cannot go with his cart, assise *quare obstruxit* lies. 48 E. 3. 28. adjudged. 48 Aff. 4. adjudged. For it is all stop'd as to the passing with carts.] Fol. 144.
- [5. If a house be levied across a way, by which, where he was wont to have his way directly, now he is made to go round about several feet out of his right way, assise *quare obstruxit* lies, because tho' he has a way, yet 'tis not so readily as he was wont. 11 H. 4. 26. dubitatur. Where the ancient way is stop't.]
- [6. An assise *quare obstruxit cursum aquæ* does not lie; for the course

See (N). Br. Nuisance, pl. 7. cites 48 E. 3. 7. that where the water is obstructed in toto, a writ will lie quod obstruxit aquam. — Pl. 13. S. P. cites 14 H. 8. 31.

course of the water cannot be totally stoppt; for when a thing is made across the course of the water, the water will reflow over the sides, which is more properly a misturning than an obstruction. 48 E. 3. 28. 48 Aff. 4. per Cand.]

## (Q) Prostravit.

F. N. B. [1. ASSISE quare prostravit pontem does not ly. 11 H. 4, 183. (N) in the notes 83.]

there cites 1 H. 4. 83. that if I have common appendant, lying beyond a bridge which a prior ought to repair ratione tenure, and the bridge falls for want of reparation, I shall not have assise of nuisance quare pontem prostravit. 1. Because there is no such writ. 2. Because here is only a negligence, and for that an action on the case lies.

## (R) Levavit.

Br. Nuisance, pl. 9. cites 11 H. 4. 25. per Hals. [1. IF a man makes a trench across my way, or other thing, the writ shall be quare levavit fossatum, sepem vel hujusmodi. 11 H. 4. 26.]

Br. Nuisance, pl. 9. [2. So if a fosse or hedge be levied, by which my land or meadow is surrounded, I may have such writ quare fossatum vel sepem levavit ad nocumentum &c. 11 H. 4. 26.]

per Hank. and so where it hinders the water to my mill, per Westbury; but June contra.

S. P. And per June, the jury [38] [3. If a man levies a house across my way, so that where I used to go directly, now I must go round about out of my right way, and not directly, I may bring assise quare domum levavit ad nocumentum &c. 11 H. 4. 25. b. dubitatur.]

ought to have the view; for the nuisance shall be ousted; and it may be that part of the way is stopp'd only, and not the whole, and then part of the house shall be remov'd, and not all. Br. Nuisance, pl. 9. cites S. C.

A. brings an action on the case 4. Quare exaltavit stagnum per quod pratum &c. Vide 2 Le. 180. Mich. 28 and 29 Eliz. B. R. Gyles's Case.

against B. and C. quare exaltaverunt stagnum &c. by which A.'s meadow is surrounded and overflowed with water; upon not guilty pleaded, a verdict is given for the plaintiff, quod crevit stagnum ut prefertur; the plaintiff has judgment affirm'd in error; for exaltavit is all one in substance with crevit. Jenk. 262. pl. 65. cites Mich. 28 Eliz. B. R.

## (S) Reformation. In what Cases a Man may reform it, and how.

So of water running to my house. Br. Nuisance, pl. 14. cites 9 E. 4. 35. [1. IF a man makes a ditch in his land, by which the water which runs to my mill is diminished, I may fill the ditch up again. 9 E. 4. 35. b.]

[2. If

[2. If a man in his own foil erects such a thing which is a nuisance to my mill, house or land &c. I may stand in my own land, and fling it down. 9 E. 4. 35. b.]

own land to the nuisance of the other, so that his mill could not grind, by which he broke the nuisance, and a house, and could not otherwise avoid the nuisance; and per tot. Cur. the breaking down the nuisance is lawful. Br. Nuisance, pl. 14. cites 9 E. 4. 35.

But per Choke, the entering into the land of the other is not lawful, tho' the breaking be lawful: contra Danby and Littleton; for the one cannot be in several cases without the other. Ibid.

[3. So I may enter upon his foil, and deject the nuisance, and justify it in a writ of trespass. 9 E. 4. 35. Curia. \* 8 E. 4. 5. Co. 9. Baten 55. Co. 5. Penrud.]

\* Br. Nuisance, pl. 23. cites S. C. 5 Rep. 101.

b. Pearuldock's Case. — A. may enter on the owner's foil, and pull down a house that is a nuisance. 2 Salk. 459. Hill. 10 W. 3. B. R. The King v. Rosewell.

4. Nuisance ought to be abated in as convenient manner as may be: if a house be levied to the nuisance, all the house may be abated. Jo. 222. cites 8 E. 4. 5. a.

If part of a house be a nuisance, \* this part only shall

be abated: but when the house (so far as the nuisance is) is abated, 'tis not lawful to destroy the materials, but they shall remain to the owners of them, and so him that made the nuisance. Jo. 222. Pasch. 6 Car. 1. B. R. in Case of James v. Hayward. — \* Br. Nuisance, pl. 9. cites 11 E. 4. 25. per June.

When A. has a right to abate a public nuisance, he is not bound to do it orderly, and with as little damage in abating it as may be. Salk. 459. Mich. 9 W. 3. B. R. Lodie v. Arnold. — Hawk. Pl. C. 199. cap. 12. S. 75. says, that as the law is now holden, it seems that in a plea justifying the removal of a nuisance, you need not shew that you did as little damage as might be.

5. If a house adjoining to my house is on fire, I may rase it, so that it shall not burn my house. Per Littleton, Br. Nuisance, pl. 14. cites 9 E. 4. 35.

(T) Common. Reformation.

[ 39 ]

[1. ] If a man erects a gate, and hangs it upon iron-hooks across a highway, which is a common nuisance to the people of the King, any of the King's people who pass in the way may fling down the gate, and cut the gate from the hooks, or use any other means to reform the nuisance, \* and to clear the way of this impediment, without any indictment of it. P. 6 Car. B. R. between James and Hayward, adjudged upon demurrer per Curiam, against the opinion of Crook.]

Cro. C. 184. 185. S. C. cited. 2 Salk. 459. \* Fol. 145.

Mich. 9 W. 3. B. R. in the Case of

LODIE V. ARNOLD, and that tho' the defendant in that case might have opened the gate without cutting it down.

2. A rope-dancer erected a stage in Lincoln's-inn-fields, but upon a petition from the inhabitants, there was an inhibition from Whitehall. Afterwards, upon a complaint to the Judges that he had erected one at Charing-cross, he was sent for into Court; and Hale Ch. J. told him, he understood it was a nuisance to the parish, and said, that in 8 Car. 1. Noy came into Court and

Jacob Hall proceeding in erecting a great booth at Charing-cross for his feats of activity and

rope-dancing there, notwithstanding his standing his being forewarn'd by the Court of B. R. and being again brought into Court, he with great impudence affirmed, that he had the King's warrant for what he was doing, and promise to bear him harmless; whereupon the Court required him to enter into a recognizance of 300 l. to cease further building, which he obstinately refusing was committed; and the Court caus'd a record to be made of this nuisance as upon their own view (it being in their way to Westminster), and awarded a writ thereupon to the sheriff of Middlesex, commanding him to prostrate the building. And the Court said, it was a nuisance to the King's royal palace; besides that it straitned the way, and was insufferable in that respect, and that things of this nature ought not to be plac'd amongst people's habitations. Vent. 169. Mich. 23 Car. 2. B. R. Jacob Hall's Cafe.——S. C. cited by Holt Ch. J. who said, that a prohibitory writ issued, and made the party pull down his stage. 5 Mod. 142.

3. *Any person may abate a common nuisance.* 2 Salk. 458. Hill. 1 W. & M. B. R. in Case of the King v. Wilcox.——Per Houghton J. 2 Roll. R. 31.

### (U) *At what time Dejection [may be].*

Roll. R. 393. S. C. [1. **I**F a man intends to erect a house (the which house, if it be erected, will be a nuisance to me by stopping my ancient lights of my house) and for this purpose erects certain pieces of timber for the building, I cannot deject this timber before he has done more, for this of itself is not any nuisance, and it is not known whether he will proceed in the building; for nemo tenetur divinare. My Reports, 14 Ja. Norris v. Baker.]  
Throwing down materials erected erga confessionem domus upon the King's highway, & per prostrationem prædict. is roll'd and tumbled into the sea, justifiable. Cumb. 417. Lovey v. Arnold.——2 Salk 458. S. C. Mich. 3 W. B. R. Lodie v. Arnold.

Roll. R. 394. S. C. [2. *But if a man builds a house which overhangs my house, there* I may deject this house *before any water drops*, and so prevent the prejudice which may ensue before it be done in fact; because it is *apparent* (and nearly possible) Co. 5. Penrud. 101. b. My Reports, 14 Ja. B.]  
—He may prevent his being prejudiced; per tot. Cur.  
[ 40 ] 5 Rep. 101. b.——But Jenk. 260. pl. 57. adds, that (*after request*) and before prejudice, he may abate it, and that it was so adjudged and affirmed in error; but I do not observe that in 5 Rep. 101.

3. If one sees his neighbour erecting a thing which will be a nuisance, he *cannot* abate it *till* it become an *actual nuisance*; so the maxim of præstat cautela quam medela holds not in this case. Per Holt Ch. J. 12 Mod. 510. Pasch. 13 W. 3. The King v. Wharton & al.

### (W) *Who may deject it.*

S. P. Arg. Godb. 124. [1. **I**F a nuisance be done to my franktenement, I may enter into his land and deject the nuisance. 9 Rep. Baten. 55. 9 E. 4. 35. b. 8 E. 4. 5. Co. 5. Penrud.]  
—I cannot enter into the land of the other to beat it down. Het. 74. Holt v. Sandbach.——He may either have an assise of nuisance,

nuisance, or he may pull or beat down a house so built whereby his lights are stopp'd, if he can do it on his own land. *Hier. 74. Holt v. Sambach,*

If a man builds a house so near mine that it stops my lights, or shoots the water on my house, or in any way a nuisance to me, I may \* enter on the owner's soil and pull it down; and for this reason, only a small fine was set upon the defendant in an indictment for a riot in pulling down some part of a house, it being a nuisance to his lights, and the right found for him in an action for stopping his lights. 2 Salk. 459. *The King v. Rosewell.*—\* So in case of water stopp'd by which my land is drowned. *Yelv. 142.*

[2. If a man stops my way to my common, and incloses the common, I may justify the dejection of the inclosure of the common and way. 29 E. 3. \* b.] \* It should be (b)

[3. If a nuisance be done to my land in which I have an estate for years, yet I may cast down this nuisance. 9 E. 4. 35. b.] It seems that less for years

may enter and abate the nuisance *F. N. B. 184, 185. (G).*  
The makers of the stat. of W. 2. knew well, that the party injured by the nuisance, though he had but an estate for years, might enter and abate the nuisance, though made in the party's own ground, whether it were house, wall, or other nuisance, and that not only when it was in the hands of the wrong-doer, but in the hands of the alienee. 2 Inst. 405.

4. Every man may abate a common nuisance. *Br. Nuisance,* pl. 3. cites 33 H. 6. 26.

5. If water runs near a vill, and is stopp'd, any one of the vill may break the stoppage, so that the vill shall not be surrounded. *Br. Nuisance,* pl. 14. cites 9 E. 4. 35. *Br. Trespass,* pl. 186. cites *S. C.*

6. A particular person may break the hedge which severs parcel of the highway. *Br. Nuisance,* pl. 1. cites 26 H. 8. 26, 27.

7. Feoffee may abate a nuisance as well in the hands of a feoffee as in the hands of the tortfeasor himself. 5 Rep. 101. b. *Trin. 40 Eliz. C. B. Penruddock's Case.* If nuisances are increased after several feoffments, these increase

are new nuisances, and may be abated by the respective feoffees without request. *Jenk. 260. P. 57.*

8. Every parishioner may abate nuisance in coemeterio. *Jo. 222. S. P. Tho' Pasch. 6 Car. 1. B. R. in Case of James v. Hayward.* it has remained  
there 20 years. *F. N. B. 183. (I)* in the notes there (a) cites 6 E. 2. Affise 454.—And may pull down a wall hindering their way to the church, *F. N. B. 185. (B)* cites 6 E. 2.

9. A common nuisance may be abated or removed by those persons who are prejudiced by it. *Pasch. 23 Car. B. R.* And they are not compellable to bring actions to remove them. 2 L. P. R. 244.

## (W. 2) Proceedings.

[ 41 ]

1. WHEN nuisance is presented before commissioners &c. of not cleansing of a river, ad nocumentum &c. distringas shall issue against those who are presented to make the reparation &c. *Br. Proces,* pl. 101. cites 37 Aff. 10.

2. In affise of nuisance the party had the view and after was assigned upon the view, and at the day made default, and the  
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other pray'd *distringas ad respondendum* as well to the default as to the party, and could not have it, but had *respondendum to the party only, and not to the default*; quod nota. And the like distress shall be in *quod permittat*, and not otherwise; quod nota. Br. Nufance, pl. 4. cites 42 E. 3. 9.

Ibid. pl. 28.  
cites S. C.

3. It was presented in B. R. that *W. obstupavit cursum aque de S. per arbores crescentes super ripa aque malitiose & voluntarie, unde naves ibidem transientes impediuntur ad nocumentum &c.* and by some his sufferance is a tort. Per Knivet J. this is not his act, therefore he shall not be amerced, but writ shall issue to oust the nuisance at the costs of the defendant, and in case he will do nothing upon the *distringas*, other remedy shall be provided; quere what remedy? Br. Presentments in Courts, pl. 11. cites 42 Aff. 15.

4. In this action they shall not *fouch by distress infinite* any more than in trespass; for there if the one appears, and the other not, they shall proceed against him who appears; and if he be convicted, and the plaintiff will waive his suit against the other, he shall have judgment and execution immediately, and so here; Per Belknap. Br. Nufance, pl. 6. cites 50 E. 3. 11.

### (X) Pleadings in Abatement or Bar.

Quod permittat by the Bishop of Winchester, against the Abbot of Hyde of the turning of water, the

defendant said, that it was not turned in the time of the plaintiff, and therefore it is not to the nuisance of his franktenement, by which the writ was abated by award; for false &c. quod nota. Br. Brief, pl. 529. cites 2 H. 4. 13.

1. IN assise of nuisance the defendant said, that the house which is supposed to be to the nuisance, was levied in the time of the predecessor of the plaintiff; and if &c. that the plaintiff has no way there &c. but at the sufferance of the tertenant, and so levied without tort and nuisance, and well. Br. Nufance, pl. 36. cites M. 18 E. 2. and 20 E. 3.

2. Assise of nuisance of levying a bank in K. the defendant said, that K. is a hamlet of S. Judgment of the writ, and if found that it be not &c. that the bank was levy'd in the time of one J. N. who infeoff'd him of the land in which &c. and it was adjudged a good plea. Br. Nufance, pl. 39. cites 3 E. 3.

3. In assise of levying a lime-kiln to the nuisance of the plaintiff; the defendant said, that there was a lime-kiln levied there before the plaintiff had any thing in the franktenement, to which he supposes the nuisance, and used, *absque hoc* that there was a lime-kiln levy'd after to the nuisance &c. Prist &c. and this issue taken; for if the nuisance was made in the time of the plaintiff he shall not have thereof assise of nuisance; quod nota. Br. Traverse per &c. pl. 167. cites 4 Aff. 3.

4. By jointenancy or nontenure the writ shall abate; but it is said there, that in action real against two, the one shall not answer without the other, or till the process be determined against the other. Br. Nufance, pl. 6. cites 46 E. 3. 23.

5. Assise of nuisance of *mis-turning a water, so that his mill could not grind*; and it was said, that he should have assise de *libero tenemento* when the mill cannot grind; but *where the mill is in one vill, and the mis-turning the water is in another vill*, then assise of nuisance lies; for if he brings assise of novel disseisin de *libero tenemento*, he shall recover nothing but in the vill where the disseisin was; and therefore because the mill is in another vill, nothing shall be redress'd in this vill but only where the mis-turning was, viz. the diverted course of water; but if all had been in one vill, the writ had been abated as above. Br. Nuisance, pl. 18. cites 9 Aff. 19. [ 42 ]

6. Where he *assigned the nuisance in B. and he broke it in B. and C.* yet well, notwithstanding that C. be not named; for the *first cause arose in B.* where the nuisance commenc'd, and therefore well; and the writ by this shall not abate. Br. Nuisance, pl. 19. cites 16 E. 3. lib. Aff. 3.

7. Assise of nuisance where he had a meadow in N. and he and those whose estate &c. have had a way from the said meadow to the high-street of N. thence to go to what part he will, there has the defendant levied a house across the way, by which he cannot go, but a long way about, and so to the nuisance; and the plaintiff held good, as well as if he had claim'd it to his house; quod nota; by which the defendant said that the plaintiff had it by sufferance for a swarth of hay, and travers'd the prescription &c. Br. Nuisance, pl. 21. cites 20 E. 3. 18.

8. In assise of nuisance it is a good plea, *that this land to which the nuisance is done extends into this vill and another.* Br. Brief, pl. 455. cites 46 Aff. 9. But where one said, that the gorse in which the

nuisance is supposed to be, extends into A. B. Judgment of the writ brought in A. only, he was ousted of the plea, because the defendant had pleaded to the action before; quod nota; for otherwise it seems that it had been a good plea. Br. Nuisance, pl. 6. cites 46 E. 3. 23.

9. But it is no plea that the plaintiff has brought trespass of this nuisance with a continuando of the aforesaid trespass &c. within which time the assise of nuisance is; for trespass or breaking cannot be continued. Br. Ibid.

10. In assise of nuisance before Justices the party shall not have the view, but the jurors; and if the party pleads to the writ matter triable by the assise, yet he shall plead over to the assise no tort, or not levied to the nuisance; so that a man shall have but one issue at his peril; and in case this be found against him, he has lost without inquiring further of the principal point. Fitzh. Nuisance. pl. 10. cites H. 50. E. 3. 11. per Belk.

11. Pardon for a nuisance is void, as for the continuance thereof. Cro. J. 492. in Case of Dewell v. Sanders.—cites 22 H. 6.

12. If a man does a nuisance, and after he reforms it before action thereof brought, the action is determined, and no action of nuisance lies. Br. Nuisance, pl. 2. cites 28 H. 6. 12. per Moyle Arg. And if the party who is griev'd abates a nuisance, he

shall not have action of trespass of the damages mesne. Br. Trespass, pl. 72. cites 2 H. 4. 11. —Br. Action for Case, pl. 29. cites S. C. per Thirning.

For in assise of nuisance, it is a good plea that the plaintiff has broke down the nuisance pending the writ of assise of nuisance. Br. Brief, pl. 455. cites 46 Aff. 9.

13. Trespass upon the case for stopping of water, and counted how the water ought to have its course by the sewer of Henly to Abbingdon, there has the defendant stopped the said sewer in A. by which the water has surrounded 20 acres of the plaintiff's land in A. ad damnum &c. Choke said, before the trespass R. C. was seised of a mill in A. across the said sewer in fee, and of a bay, and of a gutter in the said bay, which said bay and gutter are of the contrary side of the said sewer on the west, and that R. C. and all those whose estate he has in the said mill, bay and gutter have used to repair, or new make the said bay and gutter, as they were before the rupture time out of mind, and have used to cleanse the gutter aforesaid, and so cleansed to demise &c. and that before the trespass the said R. leased the said mill, bay and gutter to the defendant for 20 years; which yet continues, by which he was possessed; and \*because the said bay and gutter were ruinous, the defendant repair'd them, which is the same stopping of which the action is brought, judgment &c. and to the stopping of the rest not guilty, and the other e contra; and by the Reporter this is no issue, but shall say that he did not stop; but see elsewhere that † not guilty is a good issue where the thing lies in feaseance; contra where it is of nonfeaseance; as where a man ought to repair a bridge, make a house &c. and does not, there not guilty is no plea, as appears elsewhere; and the plaintiff assigned the trespass in another place, viz. in the east part, by which he made other plea for the east part; and the plaintiff said, that he stopped it de son tort demesne, absque hoc, that the said R. and all those whose estate &c. have used to stop the said sewer in the east part modo & forma; and the other e contra. Br. Action sur le Case, pl. 77. cites 39 H. 6. 32.

[ 43 ]  
\* Orig.  
(purle ruine  
le dit bay  
&c.)

† S. P. Br.  
Action sur  
le Case, pl.  
111. cites 2  
E. 6.

14. Nuisance, that he levied a mill in D. to the nuisance of his franktenement there; the defendant said, that he and all those whose estate he has, have had a mill in D. time out of mind, which fell by tempest, and he re-built it, absque hoc, that he is guilty of any nuisance in D. in the county aforesaid prout &c. and well, to traverse the vill only, because it is of a thing local; but in battery and goods carry'd away, he ought to traverse all the county; for those are transitory. Br. Nuisance, pl. 34. cites 18 E. 4. 1.

15. Trespass upon the case where the plaintiffs &c. have been seised of certain houses and gardens in right of the church time out of mind &c. and that they and their tenants time out of mind &c. have had a water-course in a river running into a ditch from the river of T. to the houses and gardens to die cloths, water beasts, and to bake and brew, there has the defendant levied a lime-pit for skins of calves and sheep so near the said river, that the corruption of the said lime-pit has corrupted the said river, by which his tenants left him; per Keble the writ is, that the defendant has levied &c. there, which shall be intended in the soil of the plaintiff, and

and then trespass vi & armis lies; and a good exception, per Cur. wherefore it was amended ex assensu; by which Keble said, that the plaintiff has nothing in the water but in common with W. S. and no plea; wherefore he said, that the plaintiff has nothing in the land cover'd with the water but jointly &c. Br. Action sur le Case, pl. 123. cites 13 H. 7. 26.

16. In an assise of nuisance he may in his plea shew the nuisance to be to diverse freeholds. F. N. B. 185. (C).

17. When a man has lawful easement or profit by prescription time whereof &c. Other custom which is time whereof &c. cannot toll this; for one custom is as ancient as the other; as if A. has a way over B's land to his franktenement by prescription of time whereof &c. B. cannot allege by prescription or custom to stop the said way. 9 Rep. 58. b. Mich. 8 Jac. Aldred's Case.

### (Y) Pleadings. Issue.

1. A. And M. his wife brought nuisance against J. S. for levying of a market in W. to the nuisance of their free-market in R. for that the said A. and M. in right of the said M. had their market every Wednesday in R. to which market the country people near used to come &c. of whom the plaintiffs had toll &c. and the defendant levied a market at W. to hold the same day only two miles from R. and that the country people who used to come to S. do go to W. The defendant defended the tort and demanded the view, but it was not allowed. 2d. He also took exception, because they did not say their market was elder, but it was not allow'd; for it shall come by way of plea. 3d. He took exception, because M. had it only for life, and so sought to have another count, sed non allocatur; wherefore he pleaded, that he had not levied any market to the nuisance of their market, and issue was taken, and the averment received by award. F. N. B. 184. (A) in the notes there (b) cites Pasch. 13 E. 3. W. de Clynton's Case.

[ 44 ]

2. In assise of nuisance vicontiel, they shall have but one issue, as in præcipe quod reddat, and shall not say, and if found that it be not, non levavit ad nocumentum, as in assise; per Belk, to which it was not answered. Br. View, pl. 82. cites 50 E. 3. 11.

### (Z) Indictments &c. Pleadings and Judgment.

See Chimia  
—Indict-  
ment (Q)  
pl. 10. &c.

1. A. Was seized of land in which B. had common, and inclosed the land, whereupon A. was indicted for making such inclosure, vi & armis. It was moved that indictment lay not upon this matter, but an action upon the case, and that had it been upon the lands of another, it were not material; for it is but a hindrance from the taking of common, which cannot be vi & armis; and for that and other reasons the defendant

was discharged. 2 Le. 117. pl. 159. Mich. 29 & 30 Eliz. B. R. Willoughby's Case.

2. An exception was taken to an indictment for incroaching upon the highway, because it was *not expressed of what place he was*. Sed non allocatur; for procefs of outlawry lies not against him, but distrefs. Cro. E. 148. Mich. 31 & 32 Eliz. B. R. Ld. Dacre's Case.—Ibid. says it was so ruled in Ld. Paget's Case.

3. An indictment was for *stopping quandam viam valde necessariam for all the King's subjects there passing*. Exception was taken to it, because it wanted the word (*regiam*); and the word (*necessariam*) doth not imply any matter; for a foot-way is necessary, and for that and another cause the party was discharged. 4 Le. 121. pl. 243. Trin. 32 Eliz. B. R. Keen's Case.

4. One pulled down part of a house which was a nuisance to his lights, the right of which was found for him in an action for stopping his lights; and in an indictment for a riot in pulling it down, a small fine only was set upon the defendant. 2 Salk. 459. Hill. 10 W. 3. B. R. The King v. Roswell.

5. Exception was taken to an indictment, because it was *quia erexit quandam januam apud Hornesey in com. Middlesex in via regia ducent. unto Highgate, and doth not shew in what county Highgate was*; but *Middlesex was wrote in the margin*. The whole Court was clear in opinion that this is well, and that (*Middlesex*) in the margin shall belong to Highgate also; but per tot. Cur. it would be otherwise in case of felony. Bulf. 203. Pasch. 10 Jac. The King v. Springal.

6. A presentment was, that J. S. erected a dovecoat, and stored it with pigeons, but did not say in the presentment that it was *ad nocumentum \* ligeorum domini regis*, which ought to be in every presentment; and altho' the party hath here averred that it was *ad commune nocumentum*, yet that is not sufficient; for it ought to be in the presentment, which is the charge, and this fault was held incurable. Cro. J. 382. Mich. 13 Jac. B. R. Prat. v. Stearn.

He ought to have shewn that they flew about and devour'd the corn. Roll. R. 201. S. C.—

\* An Indictment for not repairing a bridge, by reason whereof it was ruinous, *ita quod ligei domini regis per eam transire non possunt*, and concluding with *ad nocumentum eorundem &c.* was resolved to be good without using those words, *ad nocumentum omnium ligeorum &c.* for by the King's liege people shall be understood all his liege people. Hawk. Pl. C. 1. 98. cap. 75. s. 3.

[ 45 ] 7. A presentment was made in a Leet for erecting a glass-house, which was said to be *ad magnum nocumentum per juratores jurat. pro dom. rege & dom. manerii & tenentibus*. This presentment was clearly ill, because it was not *ad commune nocumentum*. And it was said further, that the Leet was the King's Court, and therefore it ought not to be *jur. pro dom. rege & dom. manerii & tenentibus*; but the Court held it *surplusage* for the word (*tenentibus*), and good for the King and the lord of the manor; for lets are granted to the lords as derived out of the tourn for the ease of the tenants within its jurisdiction. Vent. 26. Pasch. 21 Car. 2. B. R. Anon.

8. An indictment of nuisance was quashed, because it was in *detrimentum*

*detrimentum omnium inhabitantium* &c. Mod. 107. Pasch. 26. S. C. cited Hawk. Pl. C. Car. 2. B. R. Sir John Thorowgood's Case. 197. cap. 75.

5. 3.—So where one was indicted for stopping of a highway *ad nocumentum diversorum ligorum domine regine*; and because it was not of all the Queen's liege people, he was discharged. C. C. E. 14%. Mich. 31 & 32 Eliz. B. R. Sir Rowland Hayward's Case.

Serjeant Hawkins says it may be probably argued, that an indictment for *laying logs in the stream of a navigable publick river, ad nocumentum* &c. S. may be maintained; because it cannot but be a common nuisance; and that if the law be so in this case, why should not an indictment setting forth *a nuisance to a way, and expressly and unexceptionably shewing it to be a highway*, be good notwithstanding it conclude in *nocumentum diversorum ligorum* &c. without saying omnium; and asks, why such conclusion should be more necessary in an indictment for one kind of nuisance than for any other? and says, the authorities which seem to contradict this opinion, might go upon this reason, that in the body of the indictment it did not appear with sufficient certainty, whether the way wherein the nuisance was alleged were a highway or only a private way; and therefore that it shall be intended from the conclusion of the indictment that it was a private way. Hawk. Pl. C. 193. cap. 75. f. 5.

9. If a man comes hither to receive his fine on a conviction of a nuisance, he ought not to be fined before he remove it, and hath su'd out a *constare facias* to the sheriff, and obtains a *constat* return'd that it is removed. 2 Show. 60. Pasch. 31 Car. 2. B. R. The King v . . . .

10. The owner of the *glais-house* at Lambeth was indicted, convicted and fined for maintaining that house being a common nuisance. Then comes a *general pardon*. The Court upon consideration held, that the pardon *will discharge him only as to the fine, and not as to the abatement*; for that is not a punishment of the party, but a removal of that which is a grievance to other people, and any person may abate a common nuisance. 2 Salk. 458. Hill. 1 W. & M. B. R. The King and Queen v. Wilcox.

11. A recognizance was moved to be discharged on an affidavit that the nuisance was abated, but the Court refused unless the party would confess the title, and submit to a fine in person, or try the right; and if it was found for him they would discharge the recognizance, otherwise not. Cumb. 133. Trin. 1 W. & M. B. R. Anon.

12. A person was convicted upon an indictment for being a common scold, but judgment was arrested, because the indictment was *communis calumniatrix*, where it should be *rixatrix*. 6 Mod. 11. Mich. 2 Ann. B. R. The Queen v. Foxby.

So because it was *communis rixa* instead of *rixatrix*. 6 Mod. 239.

Mich. 3 Annæ B. R. S. C.—The words *communis rixatrix* seem to be precisely necessary in every indictment of a common scold; and if such indictment concludes *ad commune nocumentum diversorum* instead of omnium &c. it has been said to be good, perhaps for this reason, because a common scold cannot but be a common nuisance. Hawk. Pl. C. 193. cap. 75. f. 5.

13. It seems agreed, that an indictment against one as a common scold is good without setting out the particulars. 2 Hawk. Pl. C. 227. cap. 25. f. 61.

14. L. was indicted for a publick nuisance to Billingsgate dock. The indictment set forth, that *Billingsgate dock was a common dock, to which all small ships coming with provision to the markets of London might come, but that no great ship ought or used to come there; that notwithstanding the defendant brought a great ship of 300 ton into it, ad commune nocumentum of all the Queen's subjects* &c. It

was mov'd to quash this indictment, that it was inconsistent to say, that a place is a common dock, and that \* it would be a nuisance for a great ship to come there ; for that a common dock in its nature is free for all ships. But the Court ask'd, why there might not be a common dock only for small ships as well as common pack and horse way. 6 Mod. 145. Pasch. 3 Annæ B. R. The Queen v. Leich.

15. The Court said, that they *never quash indictments for nuisances* ; but if a nuisance be remov'd, and the party confesses it, the removal will be a great mitigation of the fine, and in that case it may be proper to offer affidavits to lessen the offence to the Court, but not otherwise. And they put the defendant to demur, which he did. Quod nota. 6 Mod. 145. Pasch. 3 Annæ B. R. The Queen v. Leich.

16. An indictment was for keeping hogs in some of the back streets of London contra formam statuti. It was mov'd to quash it, because the swine are forfeited by the statute 2 W. & M. sess. 2. cap. 8. s. 20. and that therefore no indictment lies, at least not contra formam statuti. But it was adjudged for the King. Afterwards it was mov'd to set aside the judgment, alleging surprise and want of notice. But it was to no purpose. 2 Salk. 460. Pasch. 4 Annæ B. R. The Queen v. Wigg — But the book says that no counsel appeared for the defendant when judgment was given. Ibid.

17. Where an offence of its own nature imports a thing to be a nuisance ; it is not necessary in an indictment for it at common law, to conclude *ad commune nocumentum* of the King's subjects. Besides the word *common* supplies this defect if it was one. 10 Mod. 337. Trin. 2 Geo. 1. B. R. in Case of the King v. Dixon & Ux.

18. An indictment for doing a thing which plainly appears immediately to tend to the prejudice of the Religion or the King is good, tho' it do not expressly complain of it as a common grievance. And upon this ground it has been resolved, that an indictment for converting the King's money to one's own use is good without more. And likewise that an indictment for breaking and digging up the wall of a church of such a town *ad nocumentum Burgi ligeorum domini regis* is good. Hawk. Pl. C. 198. cap. 75. f. 4.

19. It seems that by the common law, if a fact done in one county prove a nuisance to another it may be indicted in either. 2 Hawk. Pl. C. 221. cap. 25. f. 35.

### (A. a) Punishable. How. And Judgment in Actions.

1. **I**F the nuisance had been levied in the time of the defendant, it shall be ousted by the sheriff by judgment of the Court, and the defendant who levy'd it shall be amerced ; but if it was levy'd in other time the nuisance shall be ousted as above without amercement ;

amercement; for he who is not party to the writ cannot be amerced. Br. Nuisance, pl. 39. cites 3 E. 3.

2. And it was inquir'd of what quantity the nuisance was made, In nuisance for inban-  
 who said of the length of 3 foot; by which this was ousted, and cing of a  
 the rest of the bank not, quod nota. Br. Ibid. \* pool if it  
 be found for

the plaintiff, the judgment shall be to oust that which is inbanned and no more. Br. Nuisance,  
 pl. 17. cites 8 Aff. 9. — But in assise of nuisance, that he serv'd a pool to the nuisance, which is  
 found for the plaintiff, there the judgment shall be that the whole shall be removed, note the diversity.  
 Ibid. — \* Orig. Stank.

3. Where a man abates parcel of a gorse, by which all the gorse  
 is broken down to the nuisance of another; there he who broke but  
 parcel of the gorse shall repair all the whole gorse; quod nota.  
 Br. Nuisance, pl. 19. cites 16 Aff. 3.

4. Assise of nuisance, that he turn'd aside a course of water to B.  
 &c. and assigned the nuisance that he had made a trench across  
 the river of B. by a water-mill of the plaintiff; so that it was turn'd  
 aside; and so that where the mill was wont to grind in one day and  
 a night 3 quarters of all manner of corn, it cannot now grind but  
 one bushel; and also that the water surrounded 15 acres of meadow  
 of the plaintiff adjoining to the same mill, so that where he was  
 wont to have 40 load of hay, now he cannot have but 7 load; and  
 where he was wont in the same meadow after the hay cut once,  
 and carry'd away, to have pasture there for 40 grafs beasts, he  
 cannot now pasture but 6. The defendant challenged the plea, be-  
 cause it is not to the nuisance of diverse franktenements & non allocat-  
 tur, and after it was agreed that the water shall be remov'd into  
 its right place at the costs of the defendant, and the plaintiff shall  
 recover his damages, and that the defendant capiat; quod  
 nota. Br. Nuisance, pl. 25. cites 32 E. 3. 8.

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5. 6 R. 2 cap. 3. enacts, That writs of nuisances called vicontiels,  
 shall be made at the election of the plaintiff in the nature of old times  
 used, or else in the nature of assises determinable before the King's  
 justices of the one bench or the other, or before the justices of assise, to  
 be taken in the county.

6. 12 Ric. 2. cap. 13. enacts, That proclamation may be made  
 as well in London as in other cities and towns, that none cast any  
 annoyance, dung, entrails, nor any other ordure into the ditches,  
 rivers, waters, and other places; and if any do, he shall be called  
 by writ before the Chancellor at his suit that will complain; and if  
 he be found guilty, he shall be punished after the discretion of the  
 Chancellor.

7. In assise of nuisance the nuisance shall be removed at the  
 costs of the defendant. Br. Action sur le Case, pl. 29. cites  
 2 H. 4. 11. per Hank.

8. Of a common nuisance none shall have action, but shall pre-  
 sent it in the Leet or Tourn, and impose a fine for the King, but  
 any one may break it down. Br. Nuisance, pl. 3. cites 33 H. 6.  
 26. per Prisot.

Br. Nu-  
 sance, pl. 8.  
 S. C.

9. Of nuisance of a way not repair'd presentment lies, but  
 not

not action for him whose horse is mir'd. Br. Nufance, pl. 29. cites 5 E. 4. 3.

10. If nufance be made by *levying a fosse* in the highway, the King ought to make the punishment, and the Lord of the soil shall have action for the digging of the land; per Catesby; quod Needham concessit. Br. Nufance, pl. 30. cites 8 E. 4. 10.

11. An action upon the case ought to be brought against one that makes a private nufance, and he ought not to be indicted for it. Pasch. 23 Car. B. R. For indictments ought to be in the King's name, and are presumed to be preferred for offences done against the publick, and not for private injuries. 2 L. P. R. 244.

12. 'Tis said that a common scold is punishable by being put into the ducking-stool. 1 Hawk. Pl. C. 200. cap. 75. f. 14.

### (B. a.) Power of Justices of Peace and Sessions,

3 Salk. 359.  
Trin. 4  
Annæ S. P.  
and seems  
to be 8 C.  
by name of  
the Queen  
v. Sainthill.

1. Justices of peace have power of nufances, and want of repairs of bridges and all sorts of publick wayes common to all the Queen's subjects, by virtue of the statute of 1 E. 3. 16. by which they are created to inquire of all publick nufances. Per Holt Ch. J. 6 Mod. 255. Mich. 3 Annæ, in Case of the Queen v. Saintiff.

For more of Nufance in general, see Actions, (N. b.) Bridges, Chimin, Common, Stopping Lights, and other proper titles.

### (A) Inforced in what Cases, and who may administer an Oath.

The Mirror  
treating of  
this chapter  
says, The  
point which

1. Magna Charta ENacts, That no bailiff shall put any man to his open law, or to an oath upon his own bare saying, without faithful witnesses brought in for the same. 9 H. 3. c. 28.

prohibits that no bailiff put a freeman to his oath without suit present, is interpretable in this manner, viz. That no justice, minister of the King, or other steward nor bailiff, have power to put a freeman to make oath without the King's commandment, nor can receive any witnesses who testify the shewing to be true. 2 Inst. 44. where Lord Coke says, that by this it appears, that under this word *balivus* in this act, is comprehended every justice, minister of the King, steward and bailiff. — S. P. Co. Litt. 168. b.

#### 2. Statute

2. *Statute of Marlebridge, 52 H. 3. cap. 22. enacts, That none shall cause his free-tenants to swear against their wills; for none shall do this without the King's commandment.*

Before this statute, lords of court barons, hundred

reds &c. where the suitors were judges, would constrain them to swear between party and party, which mischief is taken away by this branch of the act; and this is to be understood between party and party; but to inquire for the lord of all the articles belonging to the court baron or hundred, they may be sworn, and so are the books to be understood. 2 Inst. 142. where Lord Coke cites a notable record in 14 E. 1. in Banco &c. as follows, viz. *Gilbertus de Pinesbek & Richardus filius Guillelmi de Spalding implacitaver' priorem de Spalding pro eo quod cum sint liberi homines, & terras & tenementa sua tenent libere, ipse prior distringit eos ad corporale sacramentum prestandum sibi sine precepto regis contra legem & consuet' regni regis, & contra prohibitionem &c. Prior dicit quod habet libertatem & regalitatem, quod si quis captus fuerit cum latrocinio, quod ipse per balivum suum in curia sua inde habet cogn. Et quod super captionem furis cum manupere dictum fuit dictis Gilberto & Richardo, quod ad rei veritatem inde inquirend. prestarent sacramentum, qui illud facere recusant, unde dic. quod per considerationem curie pread' fuerunt ipsi districti propter contemptum predicti judic. Et quia in casu hujusmodi liber homo in curia domini sui corporale debet sacramentum prestare, si per consuetudinem ejusdem curie ad hoc electus fuerit, & idem Gilbertus & Richardus non possunt dedicere, quin per consuetud' ejusdem curie ad hujusmodi corporale sacramentum electi fuerint. Considerat' est, quod prior eat sine die, & hab. return. averiorum, & ipsi Guillelmi & Richardi in misericordia. But in the leet or tourne, the suitors may be compelled to be sworn as well for the King as between party and party; for they are not libere tenentes, as this statute speaketh, in respect of tenure; but do their suit in respect of resistance; also the leets and tournes are the courts of the king and of record; and the court baron and hundred court of other lords, are not courts of record. The rule of law is, that whensoever any man hath any thing of common right, and by course of law, the same may well be enlarged by custom and prescription; as the lord of a manor that hath a court baron of common right and by course of law, all pleas therein are determinable by wager of law; and yet by prescription the lord may prescribe to determine them by jury; and this branch doth bind the king in his court baron, hundred or county court. In a writ of right patent directed to the lord of the manor plea shall be holden of freehold; and the Court in that case may give an oath; for there is the King's writ of precept quod reddat, which is preceptum domini regis. 2 Inst. 142, 143.*

3. A new oath cannot be impos'd upon any judge, commissioner, or any other subject without authority of parliament; but the giving every oath must be warranted by act of parliament, or by the common law time out of mind. 2 Inst. 479.

4. None can examine witnesses in a new manner, or give an oath in a new case without act of parliament. 2 Inst. 719. Marg. as a comment upon part of the statute of 31 Eliz. cap. 12. of sellers of horses in fairs and markets &c.

5. Oaths are in two manners; by compulsion, as before judges who have authority to take an oath; or voluntary, by consent of the party, which is also lawful; as 10 E. 4. 11. The condition of an obligation was to prove such a thing before J. S. It is not to be doubted but that it may well be by oath before J. S. and the oath being taken voluntarily and without compulsion, it is lawful enough. Cro. E. 470. (bis) Hill. 38 Eliz. B. R. [ 49 ] in Case of Knight v. Rushworth.

6. Holt Ch. J. thought that the censors of the college of physicians might tender an oath as a necessary consequence of their judicial power, but he said he would give no positive opinion. 12 Mod. 393. Pasch. 12 W. 3. in Case of Greenvil als. Groenvelt v. College of Physicians.

## (B) The Force thereof, where there is Oath against Oath.

1. BY Glyn Ch. J. Trin. 1656. B. S. if oath be made against oath, in a cause depending in Court, this is a non liquet to the Court, which oath is true; and there the Court will take that oath to be true, which is to affirm a verdict, judgment, or other act of the Court, and not that which is made to destroy them; for this tends more to the honour of the Court, and to the expediting of justice. 2 L. P. R. 47.

2. The Court will rather believe the oath of the plaintiff than the oath of the defendant, if there be oath against oath; because it is supposed, that the plaintiff hath wrong done him, and that the defendant is the wrong-doer, and may therefore be rather supposed to swear falsely to protect himself from the justice of the law, than the plaintiff that is forced to fly to the law to obtain his right. Pasch. 23 Car. B. R. 2 L. P. R. 247, 248.

3. Where there is a suit in Chancery, and there is a single witness against defendant's oath, 'tis not sufficient evidence to decree against him, nor will the Court after that send it to be tried at law, where one witness is sufficient. Hill. 1692. 2 Vern. 283. Christ. Coll. v. Widdrington.

4. There being oath against oath, whether a plea came in in time, it was refer'd to a trial at law on a feign'd issue, to satisfy the conscience of the Court, and in the mean time the judgment to stand. Comb. 399. Mich. 8 W. 3. B. R. Collins v. Lawley.

5. Where the defendant in his answer deny'd notice of the plaintiff's title, which the plaintiff proved by one witness; by the usage of the Court of Chancery it is not sufficient to ground a decree for the plaintiff, being oath against oath; but the course has been to direct a trial at law. It was now said by the Lord Keeper, that he did not see the difference between doing it *per plura* and *per pauciora*; for to send it to law to be tried, where the jury will certainly find it on the testimony of one witness, and then decreeing it on that verdict, is the same thing as decreeing on one witness without any trial at all; and therefore directed it to be tried; but that the plaintiff should admit the defendant's answer to be read at the trial, not as evidence (for that he said it could not be), nor should they admit it to be true, but to be sworn; so that defendant might have the benefit of his oath at law, as in this Court, if it would weigh any thing with the jury. P. 1796. Abr. Equ. Cases 229. pl. 13. Ibbotson v. Rhodes.

(C) In what Cases the *Plaintiff's Oath* is necessary.

1. **WHEN** a bill alleges the want of a deed, and \* seeks relief on the matter of that deed by a decree, there oath is necessary that he hath not the deed. But where the bill seeks no decree, but barely to have the defendant discover if he has such deed or not, or to have the deed produced at a trial, in that case the plaintiff ought not to be put to his oath. Tr. 14 Car. 2. 1 Chan. Cases, 11. Anon.—Ib. 231. Tr. 26 Car. 2. Anon.—Vern. R. 59. Tr. 1682. contra. Anon.—Nelf. Ch. R. 78. Tr. 14 Car. 2. Anon.—Vern. 247. Tr. 1684. Godfrey v. Turner.—Ibid. 310. Hill. 1684. Nicholson v. Pattison.—3 Ch. R. 5. after Tr. 14 Car. 2. Anon.

But where no relief can be had at law on the deed, if not lost, but the remedy is only in equity [ 50 ] (as in case of a covenant for further assurance) there oath need

not be made of the loss. per North Ch. J. 2 Mod. 173. in the Case of Howard v. Att. General.—Where the bill is for a discovery of deeds generally, and not of a particular bond or deed, oath need not be made of the plaintiff's not having them. per Ld. Macclesfield. Ch. Prec. 536. Trin. 1720. Anon.—\* Fin. R. 167. Mich. 28 Car. 2. Lathwell v. Foster.—Fin. R. 444. Hill. 32 Car. 2. Lord Grey v. Warren & al.—Vern. 180. Tr. 1683. Anon.—If the bill seeks relief generally upon any deed or bond, as to recover the money upon the bond, or the profits of the land under the deed; in these and the like cases there must be an affidavit; because such a bill does by consequence seek to transfer the jurisdiction from the Common Law to the Court of Equity. Per King C. 2 Wms's Rep. 541. Trin. 1729. Whitechurch v. Golding.—And. 542. (the next day) Saunders v. Stephens.

(D) Where a Plea of the *Defendant* must be upon Oath.

See Plea and Demurrer in Chancery.

1. **I**N a plea of *outlawry*, or of *privilege of the university*, as a scholar, defendant shan't be put to aver the plea on oath. Per Finch. K. Mich. 26 Car. 2. 1 Chan. Cases, 237. Prat. v. Taylor.
2. Plea of *outlawry* shall be put in without oath, because of the identity of persons. Per Lord Keeper. Hill. 26 and 27 Car. 2. Chan. Cases, 258. Masters v. Bush.
3. The defendant never swears a plea of a *former suit* depending; but it is always put in without oath, and there needs no positive averment that the former suit is still depending; for that is examinable by a master. Vern. 332. Trin. 1685. Wiling v. . . . .

For more of Oath in general, see Account, Affidavit, Own Oath, and other proper titles.

Obligation.

## Obligation.

{ Fol. 146. (A) Obligation. *What Persons may make an Obligation, and to whom.*

See Baron and Feme. [1. ] F *feme covert* makes an obligation it is void. 14 H. 4.  
—Grants 30. b. 33.]

(H. 8).  
See Fairs or Deeds (A). [2. So if a *monk* makes an obligation it is void. 14 H. 4.  
—Grants 31. 33.]  
(H. 8).

See Infant. [3. If an *infant* makes a deed it is not void. Contra 14 H. 4.  
—Fairs or Deeds (A). 33. adjudged.]  
—Grants (H. 8). Feoffment (E).

[4. But the obligation is *voidable*. 17 E. 3. 1. b.]

[ 51 ]  
See Grant  
(D).

(B) By what *Names*.

If it appears upon evidence that he was the same person [1. ] F a man obliges himself *by a false surname*, he shall be estopped to avoid it; because he may have divers surnames. 3 H. 6. 25. b.]  
who sealed and delivered it, the same is sufficient, and the bond shall bind him: but contra in case of a corporation. Arg. 1 Le. 163. Mich. 30 and 31 Eliz. in Case of Marriot v. Pascall.

See Estoppel (O). [2. So if a man obliges himself *by a false proper name* he shall be estopped to avoid it. 3 H. 6. 25. b.]

(C) *To what Persons* it may be made.

See Fairs or Deeds (C). [1. A *N* obligation may be made to a *feme covert*, and good. 3 H. 6. 23. b.]  
Grants (C).

See Fairs or Deeds (C). [2. But obligation made to a *chanon professed* is void. 3 H. 6. 23.]  
Grants (C).

(D) *By*

(D) By what Words Obligations may be made. [False See M.  
Latin, improper or unknown Words.]

[1. *Memorandum that I B. have received 20l. of C. which 20l. I B. promise to pay to D. In witness whereof I have set my seal.* This is a good obligation. 22 E. 4. 22. Curiam.] Br. Obligation, pl. 63. cites S. C. —Any words by

which the intention of the parties may appear are sufficient to make the condition of an obligation. 1 Saund. 66. in Case of Butler v. Wigg.

[2. [So] If it be [thus viz.] *I shall pay to you 20l. In witness* Br. Obligation, pl. 63. cites S. C. *&c. I put my seal,* [it is] a good obligation. 22 E. 4. 22.] —Went. Off. of Executors 116.

[3. So these words *concedo vobis &c.* make a good obligation. Br. Obligation, pl. 63. cites S. C. 22 E. 4. 22.]

[4. If a man binds himself in *viginti nobilis*, it is a good obligation; because there is not any proper Latin word for noble. Trin. 5 Ja. B. R. between Durchin and Vaghan.] Upon shewing Thomas's Dictionary, wherein

(*nobilis*) is set down for a nobleman, and also for the sum of 6s. 8d. it was resolved that the bond was good; and therefore adjudged for the plaintiff. Cro. J. 203. Hill. 5 Jac. S. C. by name of *Menthev v. Purchins*, *als. Burchin v. Vaughan*.

[5. If a man binds himself in *triginti libris*, where it should be *triginta libris*, yet it is good. Pasch. 17 Ja. B. between Taylor and Thorp, per Curiam adjudged.] In *tricesimo secundo libris* was adjudged good. Cumb. 60.

Trin. 3 Jac. 2. B. R. Dennis v. Snape.—So *tricesimo libris*, Ibid.

[6. [But] If a man obliges himself in *viginti liveris* (for *libris*), this is not good. Trin. 5 Ja. B. R. between Durchin and Vaghan, cited to be adjudged.] *Viginti* is all one with *viginti*. Cro. C. 517. Mich. 11

Car. B. R. admitted in the Case of Downs v. Hathwait.—So where the bond was in *viginti litteris*, instead of *libris*, it was judged a void bond; cited per Cur. Cro. J. 603. Mich. 18 Jac. B. R. in the Case of *Hitt v. Coore*, as the Case of *Parterols*. v. . . .

Debt upon bond, conditioned for the payment of 20l. Upon oyer it appeared to be *fratier obligari in quadraginta libris*; yet plaintiff had judgment. 12 Mod. 495. [ 52 ] Pasch. 13 W. 2. *Homes v. Barneham*.

[7. So] If a man be obliged in *quinquegentis libris*, this is not a good obligation for 500l. for *quinquegentis* is not any Latin word nor of any signification. Mich. 4 Ja. B. R. between Parry and Dale, adjudged upon demurrer. Mich. 12 Ja. B. same case in writ of error. Hobart's Reports 165, where the opinion was, that it was a good obligation for 500l.] Yelv. 95.—Cro. J. 146.—Hob. 119.—*Quinquagessimis libris* is good. Cro. J. 250. Ellis v. Clerk.—

*Quinque pro quinque* is not good. Het. 84. cites it as Parry's Case.—*Quinque* for *quinque* is not good. Yelv. 95. Hill. 4 Jac. B. R. Parry v. Dale.—And per Poph. Ch. J. *quinque* (with two i's) is incongruent Latin; but *quinque* is no Latin at all. Ibid.

Fol. 147.

[8. If a man be obliged in *septuaginta libris*, it is a good obligation for 700l. for it is a Latin word, tho' it be but barbarous Latin. Mich. 4 Ja. B. R. in the said Case of *Parry*, said to be adjudged and there agreed.]

Hob. 116.

S. C. by the

name of

WALTER

v. PIGEOT,

adjudged.

And a writ

of error was

brought, but says,

it appears not what was done upon it.

[9. If a man obliges himself in *septuaginta & quinquaginta libris*, it is a good obligation for 750l. without pleading, or finding by the jury that the intent was so. Hobart's Reports, 162, between *Waller* and *Bigot* adjudged. Intratur. Trin. 44 El. Rot. 1031. in the Common Pleas.]

Cro. J. 338.

S. C. by

name of

Marham v.

Jolly —

Hob. 20. pl. 36.

S. C. by name of

Mafdam v. Jolly.

[10. If a man be obliged in *sexaginta libris* for sexagint. libris, yet it is a good obligation. Trin. 12 Ja. B. R. between *Jolley* and *Mafbam* adjudged. Hobart's Reports 28.]

Yelv. 105.

GERRY v.

DAVIS,

that sexgin-

ta libris is a

word of no signification,

and adjudged that the plaintiff nil capiat per billam.—But where the word

*sexinginta* was put for *sexaginta*, judgment was given for the plaintiff, and affirmed in error. Cro.

J. 338. Pasch. 12 Jac. B. R. Marham v. Jolles.

[11. If a man be obliged in *sexinginta libris* for sexcentis libris, it is not a good obligation; for sexinginta is not Latin. Mich. 5 Ja. B. R. adjudged between Grey and Davies.]

In *sexaginta*

pro *sexcentis*

is not good.

Cro. J. 190.

Mich. 5 Ja. B. R. per Curiam agreed.]

Greg v.

J. S.—This plea is mark'd (11) in the original of Roll as it is here.

[11. [But] If a man be bound in *sexinginta libris*, for sexcentis libris, this is a good obligation; for sexinginta is good Latin. Mich. 5 Ja. B. R. per Curiam agreed.]

This bond

was in Ita-

lian. Cro.

J. 208. Trin.

6 Jac. B. R.

S. C. by name of Parker v. Rennady.—

\* Hob. 19. Trin. 6 Jac. S. C.—S. C. cited 12 Mod.

194.—5 Mod. 281. Arg. S. C. cited accordingly, because it was an Italian bond, and not intended

to be put into Latin.

[12. If a man be obliged in *sessanta libris* for sexaginta libris, yet is good. Hobart's Reports 28. adjudged between \* Parker and Kennedy.]

Hob. 18. S.

C. accord-

ingly that it

was adjudg-

ed good for

30l. and af-

firm'd in

error.—Ad-

judged accordingly. Cro. J. 309. Mich. 10 Jac. B. R. S. C. by name of Biggins v. Titherton.—

Judgment affirmed in Cam. Scacc. Cro. J. 355. Mich. 12 Jac. S. C. by name of Higgins v. To-

therden.—Yelv. 225. Loggins v. Titherton. S. C. but reports it contra per Cur. that the plaintiff

nil cap. per billam, inasmuch as there is no such word as *trigintata*, and by consequence

[ 53 ] the party bound in no sum. And if a man be bound in an obligation in (*libris*) and does

not say how many, it is a void obligation; per tot. Cur. quod nota.

[13. If a man be obliged in *trigintata libris* it is good. For there is but one syllable (that is to say *ta*) of surplus in the end of the word. Mich. 12 Ja. in the Exchequer Chamber, between *Tetherton* and *Loggins* adjudged. Which see Mich. 12 Ja. B. Mich. 10 Ja. B. R. Hobart's Reports 26. same Case.]

Mo. 864.

Anon. but

seems S. C.

accordingly.

—5 Mo d.

23. S. P. but contra of obligent.—So in *quingagesimis libris*, shall be construed to be of all one

[14. If a man be obliged in *octogesimo libris* for octoginta libris, it is good. Mich. 13 Ja. B. adjudged between Vernon and Onslow.

seale

sent in a bond with quinquaginta, and the intent of the parties was so; and adjudged for the plaintiff. Cro. J. 290. Mich. 9 Jac. B. R. Ellis v. Clark.—One was bound in *nongint. & octog-fimis libris*; the condition was for payment of four hundred and ninety pounds with interest. Judgment upon a demurrer was given for the plaintiff. Lutw. 422. Mich. 3 Jac. 2. Rossel v. Rossel.

[15. If a man be obliged in *octiginta libris*, with condition for payment of 40*l.* tho' this word octiginta is not Latin, yet it is a good obligation for 80*l.* Mich. 3 & 4 El. B. Rot. 1350, cites Co. 10. *James's Osborne's Case* to be adjudged. See the same case cited, Hobart's Reports 27, to be adjudged contra, and that it is entered Rot. 1988, and that it was \* *Fitzhugh's Case*, where the record of it is set forth at large, and adjudged against the plaintiff. But the condition is not recited, nor any mention of it.]

*Octiginta* is not good. Dal. 37. pl. 1. anno 4 Eliz. Anon. —\* Hob. 19. Mich. 3 & 4 Eliz. C. B.

[16. If a man be obliged in *septunginta libris*, with condition for payment of 350*l.* it is a good obligation of 700*l.* Mich. 44 & 45 El. Rot. 1031. b. adjudged, cites Co. 10. *James Osborne's Case*. 133.]

[17. If a man be obliged in *viginti libris*, it is a good obligation of 20*l.* Co. 10, 133. *Osborne*.]

Br. Obligation, pl. 4. cites 3 H. 6. Latin word,

23.—Hec. 84. S. P. because there is some colour of likeness; but if the word be no so that nothing can be known what is intended it is otherwise.

[18. If a man be obliged by a bill in English, in *seventeene pounds*, which is false English, yet it is a good bill of 17*l.* Mich. 11 Ja. B. adjudged, cites Co. 10. *James Osborne* 133. for the intent of the parties appears.]

Sowhere the words of a bill obligatory were *threty two pounds*, four demurrer it

shillings and seven pence, where threty was for thirty, and ponds for pounds; upon a demurrer it was adjudged for the plaintiff. Cro. J. 607. Hill. 18 Jac. B. R. Mulbert v. Long.

[19. If a man obliges himself in *quingint. duabus libris*, it is a good obligation of 52*l.* the condition being for payment of 26*l.* For this shall be taken as an abbreviation of quinquagintis, Mich. 11 Car. B. R. between *Downes* and *Haithwaite* adjudged upon a special verdict, where the plaintiff declared upon an obligation of 52*l.* and the defendant pleaded non est factum, and this obligation and condition found in hæc verba. Intratur Hill. 9 Car. Rot. 195.]

Jo. 366.—Cro. C. 416, 417, S. C.—Debt upon bond for 50*l.* the obligation was *quantoginta libris*. Judgment for defendant, for

the insensibility of the word. 2 Lev. 166. Hill. 27 & 28 Car. 2. B. R. *Strange v. Greenhill*.—2 Jo 48. S. C.

[20. If A. be bound to a sheriff of a county in *quadragent. libris* &c. with condition to appear &c. this being a bail-bond, it is not an obligation of 40*l.* in as much as the word *gent.* refers to *centum*\*, and so it is rather 400*l.* than 40*l.* and the condition being collateral, cannot shew the intent of the parties. Pasch. 1651. between *Feilder* and *Lovey*, adjudged per Curiam, where the declaration was for 40*l.* and upon oyer demanded a demurrer, and after argument at the bar adjudged for the plaintiff. Intratur. Pasch. 1650. Rot. 430.]

\* Fol. 148.

A bond was in *quadragenta libris* condition'd for payment of 180*l.* the Court held this to be good for *quadrage-*

*dispartis*, by reason of the greatness of the sum express'd in the condition, tho' no money was paid to be lent upon it; and per Lord Chancellor, if it had been *quadragenta* it had been good in  
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law for 400 l. 2 Freem. Rep. 16 Hill. 1676. in Canc. Anon. — † Stil. 241, 242. S. C. adjournatur. — Ibid. 257, 258. S. C. adjudged accordingly.

- [ 54 ] 21. Obligation was shewn in debt, which was *Noverint &c. nos T. M. & J. G. tenemur f. M. in 20 l. & uterq' nostr' tenet'*, and in the perclose *Obligamus nos & quilibet nostrum &c. without* mentioning this clause, *Sigillum meum apposui*; and because it was *tenemur* for *teneri*, and *quilibet* for *quemlibet*, the Court would advise &c. *Quære*. Br. Obligation, pl. 30. cites 8 H. 6. 35.

A bond was thus, viz. *Noverint universæ per præsens me*

22. If an obligation has *incongruous Latin*, yet it is good: *contra of a writ*; for a man may have a new writ, but not a new obligation. Br. Obligation, pl. 71. cites 9 H. 7. 16.

T. K. de H. in *perachie W. in com. Darbie generosæ teneris & firmiter obligari* Ed. D. de M. in S. in com. Not. &c. ad quam quidem solutionem bene & fideliter faciend. *obligamus me heredes &c. sigillo meo sigillato dat. xix viginti die Octob. an. regni reginæ domini nostri Jacobo Dei gratia Angliæ &c. rege d. fensuris suis de Scotia sexto, de Angliæ quadragesimo secundo 1608.* In debt brought upon this bond the defendant demurr'd; and adjudged for the plaintiff: for there are two principal things to be contained in an obligation. 1. The parties to it. 2. The sum in which the party is bound; and both these are sufficiently express'd: and tho' false Latin will abate a writ, because the party may purchase a new one, yet it shall not destroy an obligation; for he cannot have a new obligation when he will. Per tot. Cur. Yelv. 193. Mich. 8 Jac. B. R. Dodson v. Kayes. — Brownl. 110. S. C.

23. A. delivers 20 l. to B. to buy prunes; B. makes a deed to A. testifying the said delivery and receipt; but the said deed has not a word of promise, or *teneri* or *obligari*, for payment of the said sum; B. dies intestate: an action of debt may be maintained upon this deed by A. against the administrator of B. It was so adjudged and affirm'd in error. Jenk. 195. pl. 2.

24. In *quadragesima libis &c.* for *libris* was held an ill and insufficient obligation; for *liba* signifies a cake, and the dash does not help it; so *litrīs* for *libris* is ill; and the attorney was committed to the Fleet for his knavery. Noy. 109. Hill. 3 Jac. Sherret v. Mallet.

25. Tho' the words of an obligation are not proper and apt, yet if they are *substantial*, 'tis enough. Arg. Brownl. 121. 11 Jac. in Case of Hawkinson v. Sandilands.

26. In *quatuor centum libris*, it was doubted whether it was to be intended 400 l. or 104 l. and it was adjudged naught. Het. 84. Pasch. 4 Car. C. B. cites it as adjudged in one Randall's Case.

27. In debt the plaintiff declared on a bond in *triginta & sex libris solvend' &c.* and upon oyer the words of the bond were, *sex triginta libris*; and it was held good, and no variance; for it shall be taken as one word. 2 Salk. 462. Hill. 3 W. & M. B. R. Henderfon v. Foster.

28. These words in a bond, In premid. vigin. & anno regni Car. 2. millimo sexcent septua' quarto, adjudged to be void for insensibility; and being insensible, shall be rejected, the rest being sense without them. 2 Salk. 462. Pasch. 10 W. 3. B. R. Cromwell v. Grunsden.

29. In most cases, where the *gent* or *gint*, or the *sex* or *sept* are

are right, the obligation has been held to be well. 2 Salk. 462. in Case of Cromwell v. Grunfden, cites Jo. 48. 1 Cro. 416, 418. 2 Cro. 338.

30. A man bound himself in *quadrans libris*, and the condition was for payment of 20l. 12s. The Court held that the word (*quadrans*) had been void and insensible, if it had stood by it self, as in case there had been *no condition*, or if the condition had been *collateral*; but since it has relation to the condition, they would take it to be explain'd by the condition, and to signify 40l. there being somewhat like quatuor or quadragint in it; and there are cases as strong and of as odd words. 2 Salk. 462. Pafch. 10 W. 3. B. R. Cromwell v. Grunfden.

5 Mod. 281.  
S. C. and the pleadings.—  
Comb. 477.  
S. C.—12  
Mod. 193.  
S. C.—  
Where the defendant was bound in a bail-bond in such sum,

it was objected that the word (*quadrans*) was insensible; 'tis true if the condition had been for payment of money, so that it might explain what was meant in the bond, it might be good; but where the bond is single, or the condition is for doing some collateral act (as in the present case) which doth not explain what sum is intended in the bond, there it is void. The Court staid proceedings till the roll was brought in, because it might be well there, and said that *the condition of this bond was collateral, yet the bond being made according to the statute, by which it is enacted, that none arrested by process &c. in which the true cause of action is not express'd, and for which the defendant is bailable by virtue of the statute 23 H. 6. [cap. 10.] shall be forc'd to* [ 55 ] enter into a bond with sureties for appearing in any sum exceeding 40l. Now the condition of this bond being for appearing &c. that may explain what is intended by the word (*quadrans*) in the bond, viz. 40l. according to the statute. 8 Mod. 342, 343. Hill. 11 Geo. 1725. Anon.

### (E) How it may be made. \* Single Obligation.

1. IF A. acknowledges by a bill obligatory that he owes to B. 10l. to be paid at a day after, and by the same bill binds himself and his heirs in 20l. and doth not say to whom he binds himself; yet it is a good bill and shall be intended to be bound to B. to whom he acknowledged before the 10l. to be due. Mich. 10 Car. B. R. between *Franklin* and others plaintiffs, and *Turner* defendant, adjudged upon a demurrer. Intratur Trin. 10 Car. Rot. 949. Hill. 1649. between  
adjudged upon demurrer. 2 E. 4. 22.]

\* This belongs not to the plea in Roll; but as to this fee Conditions (Y) and (E. a) — See (O) — So where the obligation was thus, viz. Know all men that I P. G. do

and bound (not said to whom) in the sum of 16l. and it is to be paid to J. S. the elder's executors; for which payment to be made I bind me, my heirs and executors (but says not to whom); the defendant demanded oyer of the condition, which was (inter alia) if therefore the defendant shall pay to J. S. the elder's executors within one year after his death, the bond shall be void; and upon this the defendant demurred. And upon argument and deliberation all the Court resolved and gave judgement for the plaintiff, who was executor of J. S. 3 Lev. 21, 22. Trin. 33 Car. 2. C. B. Langdon v. Goole.

2. A man bound himself to another to pay 6l. the third day of May next, and if he did not pay the 6l. the same day, he granted by the same deed to pay to him the same day 10l. and after he did not pay the 6l. the same day, by which the obligee brought action of 10l. and recover'd; and so the obligation good for the greater sum for default of payment of the less sum. Br. Obligation, pl. 79. cites 26 E. 3. 71. and Fitz. Det. 181.

(E. 2) How it may be made. *In the third Person.*

Debt upon an obligation, which was in the third person, and no mention was that the parties had put their seals to it; and therefore by award the plaintiff took nothing by his writ quod nota; for this statute is that the obligation in the third person in a Court out of the realm shall be void: but Brooke makes a quere if it be material that these words sigillum apposuit were wanting. Br. Obligation, pl. 8. cites 40 E. 3. 1.—And concordat anno 7 H. 7. 14. as to the seal.

1. 38 E. 3. Stat. *Whereas divers people are bound in another Court out of the realm, by instruments or otherwise, it is accorded that all penal bonds in the third person be void, and holden for none.*

Obligation made in the third person is good enough; for this statute is that of bonds made in a Court out of the realm in the third person shall be void. Br. Obligation, pl. 51. cites 8 E. 4. 3. per tot Cur.—S. P. per Hank. Br. Obligation, pl. 65. cites 2 H. 4. 9. So a gift made by deed-poll in the third person quod præsens scriptum testatur quod A. dedit, tradidit &c. is good enough as it is in an indenture. Br. Obligation, pl. 51. cites 8 E. 4. 5.—Brooke says, that hence it seems that bonds in the third person not made in Courts out of the realm, are good. Br. Obligation, pl. 65.

This statute is to be intended of bonds taken in other Courts out of the realm, and so it appears by the preamble of the act; and it was principally intended of the Courts of Rome; and so it appears by Justice Hankford, in 2 H. 4. in which Courts bonds were taken in the third person; wherefore such bonds made out of the realm are void; but other bonds in the third person are resolved to be good as indentures in the third person, by the opinion of the whole Court in 8 E. 4. Co. Litt. 230. a.

[ 56 ] (F) *With Condition.* [In respect of the Place where wrote.]  
See Indorsement (A).

Obligation for 20*l.* and endors'd before sealing and delivery, thus, *The intent of this bond is to pay 10*l.* for costs*; it is no good condition. Per Hutton and Harvey what is wrote after sealing and delivery is no part of the condition. Het. 137. Hill. 4 Car. C. B. Taylor's Case.

[1.] If the condition be wrote on the back of the obligation; yet it is good. 41 E. 3. 10. b. 7 H. 4. 11. b.]

(G) By what Words an Obligation may be; *Joint or Several.*

\* Orig. is (quilibet). [1.] If three bind themselves & eorum \* quemlibet, either of them may be sued alone. 34 E. 3. Execution 129.]

D. 310. b. pl. 80. [2. But two of them only cannot be sued, but either all ought to be sued or one. 34 E. 3. Execution 129. (Quere this).]

\* Orig. is (alter). [3. If two bind themselves in an obligation, vel \* alterum eorum, this makes the obligation joint or several. 7 H. 4. 6. b.]  
Nol vel al-  
terum nostrum, they ought not to be sued by several preceses, but both together, or one of them by one prece only. D. 310. b. pl. 80. cites Mich. 7 H. 4. a.

D. 310. b. pl. 80. [4. If two bind themselves in an obligation by these words Obligamus nos & quemlibet nostrum, the obligation is joint and several. Dubitatur. 8 H. 6. 35. b.]

[5. If

[5. If *two* bind themselves in an obligation by these words *Obligamus nos & utrumque nostrum*, the obligation is joint and several. 16 E. 2. Annuity 47.]

D. 310. b. 5 Rep. 103. —Farr. 153. —If three are bound

by *utrumque nostrum*, it is joint and several. *Quære*.—D. 19. b. pl. 114.—*Dal.* 8g. pl. 42. S. P.—*But* if three bind themselves *& utrumque eorum*, this is joint, per Auger; because it is uncertain who.—A. and B. and either of them do acknowledge to owe &c. for which payment they bind themselves, is joint and several. *Sid.* 189. Pasch. 16 Car. 2. B. R. *Burden v. Ferrers*.

[6. If *two* bind themselves in an obligation by these words, *Obligamus nos vel utrumque nostrum* in the disjunctive, yet the obligation is joint and several; for the word *vel* makes it several at election. Pasch. 11 Jac. B. R. adjudged upon demurrer between Haukinson and Sir James Sandelon.]

Brownl. 122. S. C. —\* *Utrumque nostrum in folido* is joint and several. D. 310. b. pl.

80. said to have been so adjudged.—So *obligamus nos & utrumque nostrum* without the words *in folido*. Br. Obligation, pl. 84. cites Fitzh. Annuity 47.—S. P. 1 Salk. 393. Hill. 1 Anne B. R. in Case of Robinson v. Walker.

\* S. P. And that it is as good as *quemlibet in folido*. Br. Obligation, pl. 86. cites 10 E. 3.—S. P. Arg. cites it as so held, D. 19. pl. 114. and 39. H. 6. 9. that *uterque* is as good as *quilibet*. 2 Bulf. 70. in Case of HAUKINSON v. SANDILANDS. And by Doderidge J. the joint delivery of the bond in this case shall not make it to be a joint bond, and not several, the same being joint and several by the law; and the whole Court agreed that the bond was joint and several, and judgment was given and entered for the plaintiff.—Cro. J. 322. S. C. adjudged.

[7. If in a charter party the merchants covenant with the owners in this manner, (that is to say) *that the merchants for themselves, their executors and administrators, and for every of them do severally covenant, promise and grant to and with the owners to pay for freight of the ship according to the rate of 120 l. for every month that the ship shall be in the said voyage &c.* In this case the covenant is joint and several in as much as the subject matter is joint (that is to say) the freight to be paid by them all; and the said words (*and for every of them*) refer to the words (*do severally covenant*) and the first words (*that is to say*) *for themselves &c.* make it joint. Trin. 8 Car. B. R. between Linn and Harris plaintiffs, and *Cressing* and others defendants. Adjudged per Curiam upon demurrer. Intratur Mich. 7 Car. Rot. 108.]

8. By *two*, *Obligamus nos & unumquemque nostrum* without more makes it joint and several. D. 310. b. pl. 80. cites H. 16 E. 2.

Br. Obligation, pl. 92. cites 13 E. 3.

9. Three were bound in a bond by these words *Obligamus nos et quemlibet nostrum conjunctim*, and it was holden by the Court to be joint-bond, and not several; for the word *quemlibet* is expounded by the word *conjunctim*. 3 Le. 206. Pasch. 30 Eliz. B. R. *Wigmore v. Wells*.

## (H) Covenant [or Obligation] Joint or Several.

Fol. 149.

[1.] If the merchants in a charter party covenant with the owners *severally*, that the one merchant will pay 3 l. another 3 l. and the *so of the rest*; but the words are *conveniunt separatim*, and in the conclusion is such clause, *& ad performance omnium & singularum*

See (G) pl. 7.—In covenant the plaintiff declared,

that the defendant and J. S. *convenirent pro se & quolibet eorum, that they or either of them would lade such a ship, and pay for the freight &c.* The defendant pleaded in abatement, that the other covenantor was in full life not named, and prayed judgment of the writ. Holt Ch. J. took a diversity between the words, viz. *A. and B. conveniunt & quolibet eorum convenit, and A. and B. conveniunt pro se & quolibet eorum*; for in this first case quilibet eorum convenit expressly severs the lien; but (*pro quolibet eorum*) seems to go to the thing to be done, that is, that they both or either of them would do it: but the other Justices e contra; and judgment was, that the defendant should answer over. 1 Salk. 393. Hill. 1 Annæ B. R. Robinson v. Walker.

[2. If in an indenture there are three of the one part, and two of the other part in which the two covenant jointly and severally to do a certain thing, and the three covenant also jointly and severally with the said two after the performance of the said thing by the two to pay to the said two a certain sum for every particular &c. and after follow these general words (that is to say) *pro vera & reali performatione omnium articulorum & agreementorum predictorum alternatim utraque partium predictarum obligavit se heredes, executores, administratores & assignatos suos in & subter pœnaltatem sexaginta librarum sterlingorum.* The question was, whether in an action of debt upon this last clause for the 60l. the action might be brought against one of the said three only, that is to say, whether it be joint and several as well as the covenant is. Tr. 1652. Judgment was given against the plaintiff, scilicet, that this covenant was joint and not several (against my opinion) by the other three Judges. But diverse of the Judges and Serjeants at the table at Serjeant's-Inn in Fleet-street upon the putting of the case to them were of my opinion. Trin. 1651. Rot. 522.]

Two are bound jointly and severally in a bond, one executes

[3. If an obligation be written in the name of two joint and several, and they severally deliver the obligation at several times and places, yet this is joint and several. 8 H. 6. 31.]

first of May, the other the first of July; this is a joint bond. Lat. 61. Arg. Hill. 22 Jac. in Case of the Bishop of Norwich v. Cornwallis.—See Croft v. Harris.

[ 58 ] 4. If a man covenants with ten, and with each of them to make the sea banks in D. and does not do it, by which the land of two of the ten is surrounded, the two may have an action of covenant without the others; per Cur. Br. Jointenants, pl. 72. cites 6 E. 2.

5. Where three are bound by obligation jointly and severally, and each in toto, the obligee shall not have an action against two alone, but against all three or against every one by himself. Br. Jointenants, pl. 1. cites 27 H. 8. 6.

6. A. bound in a bond to B. and C. solvendum the one moiety to B. and the other moiety to C. 'tis a several obligation, and the release of one shall not prejudice the other, and yet by the premises

mises it was a joint contract; per Brown. J. Mo. 64. Trin. 6 Eliz. Anon.

7. Bond to 2 for 200l. to pay 100l. to one and the other 100l. to the other; one obligee dies; quære if the whole *surviver*. D. 350. pl. 20. Pasch. 18 Eliz.

M. 21 & 22  
Eliz. C. B.  
it was re-  
solv'd per  
Cur. that

the 200l. survives, and that those words, viz. 100l. to one and 100l. to the other are void words. D. 350. Marg. pl. 20.

8. Debt was brought upon a bill for 20l. which was thus, viz. *Memorandum, that I Wm. S. have received of T. B. 40l. to the use of J. N. and M. his wife, equally to be divided between them; which said sum I acknowledge to have received to the uses aforesaid, and the same to re-deliver at such time as shall be thought most for the profit and commodity of the said J. N. and M. his wife.* J. N. died intestate, and R. N. took administration to J. N. and brought debt against W. S. for 20l. and agreed per Walmsley, Glanvill and Kingsmill J. that this is a debt due to J. N. and M. his wife. And per tot. Cur. if it be a debt, it is a divided debt and not joint; for there Glanvill said, that there may be several bills to several men, of several sums, viz. 20l. to one and 20l. to another in one deed. *Ex libro*, Mr. Andrews, D. 350. Marg. pl. 20. Mich. 41 & 42 Eliz. Rot. 2504. Shaw v. Sherwood.

Ow. 127.  
S. C.—Cro.  
E. 729. S.  
C. Resolved  
that they  
should be di-  
vided debts,  
by reason of  
the words  
*equally to be  
divided &c.*

9. If three are nam'd in a bond, and but one only seals, the bond is single. 1 Saund. 291. Trin. 21 Car. 2. B. R. Cabel v. Vaughan.

Sid. 420.  
S. C. (but  
not S. P.)  
by name of  
Chappel v. Vaughan.

10. Action of covenant was brought by the herald painters, & *pro quolibet & singulis eorum*, that they should bring their work to such a place, and that there such work shall be done &c. And because one of the covenantors did not bring his work to the place aforesaid, there to be worked, the others brought this action &c. and the action was adjudged to be well brought; for the action is founded upon the work not being brought to the place appointed for it; and in this part the covenant is joint, and the interest joint. Skin. 401. Mich. 5 W. & M. B. R. Saunders and Johnson.

11. In indentures of apprenticeship, the father covenants to pay the apprenticeship money, the son covenants to account for his master's goods, and in the conclusion father and son each bind themselves for the true performance of all covenants and agreements therein. Per Cur. The end of binding the father was to answer wrongs done by the son; and he must answer for any; and the covenant that each did bind himself &c. must be so where the son is bound to perform the thing for which the covenant was made, and this clause is usually inserted, that the covenants may be taken distributively, viz. that each of the covenantors should perform his part, and this makes the covenant of the son bind the father, who covenanted for him as well as for himself. 8 Mod. 190. Mich. 10 Geo. 1. 1724. Whitley v. Loftus.

(I) [*What shall be said an*] Obligation.

Cro. E. 461.  
S. C. adjour-  
natur. —  
Ibid. 544.  
adjudged  
that debt  
was well  
brought up-  
on it as upon  
a bond.  
S. C. —  
S. P. But  
afterwards  
the judg-  
ment was re-  
versed; and  
held, that it cannot be sued as a bond, because it wants delivery. Mo. 405. Trin.  
37 Eliz. S. C. by name of *Ascue v. Holingworth*.

[1. I F [a man] obliges himself in a statute merchant acknowledged before the Mayor of Lincoln, if the statute has not the seal of the King annexed to it, by which it cannot be a statute to be executed according to the statute de mercatoribus, yet it shall be an obligation, upon which the obligor may be charged in an action of debt; for tho' it was intended to be a statute and so a record, yet inasmuch as it cannot take effect, it shall be an obligation in as much as he has seal'd it, and acknowledged it to be his deed.

B. between *Ascue* and *Haliworth* adjudged, upon which judgment, a writ of error was brought in B. R. H. 38. Fl. B. R. and there held accordingly.

B. R. H. 38. Fl. B. R. and there held accordingly.

See Execu-  
tors. — *Faits*  
(C. a. 2)  
• Br. Obli-  
gation, pl.  
15. cites  
S. C. —  
+ Br. Obli-  
gation, pl.  
15. cites  
S. C.

(K) *Who shall be bound by Obligation without naming.*

[1. THE executors of the obligor shall be bound by the obligation, without naming \* 45 E. 3. 17.

[2. So the ordinary shall be bound if he administers. † 45 E. 3. 17.]

(L) *What amounts to an Obligation or Bill obligatory.*

1. ALL words which prove by specialty, that the maker is debtor to another, amount to a sufficient obligation. D. 23. pl. 143. Trin. 28 H. 8.

2. Any words, by which the intention of the party may appear, are sufficient to make the condition of an obligation; because if the words, tho' they are improper, shall be construed void, and not a condition, then in several cases the obligation shall be single and of force against the defendant, tho' he has perform'd the condition of it according to the intent of the parties; and the condition being for the benefit of the defendant shall be constru'd favourably for his advantage. Saund. 66. Pasch. 19 Car. 2. *Butler v. Wigg*.

3. A man declar'd in debt upon tally of the defendant seal'd, & non allocatur, because it was not specialty. Br. Obligation, pl. 67. cites 44 E. 3.

4. Debt upon tally against executors, which tally was seal'd and writ, and the testator had granted to pay 20l. at 2 days, and two scotches were upon the tally, each for 10l. Per Skrene, the writing

writing may easily be wash'd out by water or the like; and after it was agreed that the plaintiff shall be barr'd. Br. Obligation, pl. 80. cites 12 H. 4. 23.

5. *I owe to A. B. 20l. to be paid in watches.* Action must be brought for the money and not for the watches; for it is not certain how many watches. And. 117. Hill. 26 Eliz. Anon.

6 A bill sealed was, viz. Memorandum, that *I have agreed to pay to R. S. 20l.* Exception was taken, because the words of the contract are in the *preter tense*, but the plaintiff had judgment notwithstanding. Le. 25, 26. pl. 32. Trin. 26 Eliz. B. R. Bedow's Case.

7. A bill was made in these words, Be it known &c. that *I owe to P. 14l. to be paid at the feasts &c. together with 6l. which I owe him upon bills and reckonings, subscribed with my hand.* P. brought debt for 20l. and adjudged against him, because the bill does not make him debtor for more than 14l. and the words (together with 6l. which I owe by bills &c.) is only an explanation of the precedent debt, and an assent to pay it at a time certain. Whereupon P. brought debt afterwards for the 14l. Mo. 537, pl. 702. Trin. 36. Eliz. Parry v. Woodward.

a debt of 20l. and not of 14l. and therefore he ought to have counted accordingly, and at least he ought to have counted upon the bill as it is. But all the Judges and Barons resolv'd that it was good enough; for there is 14l. due upon this bill, and that which comes after the solvendum is void in like manner as that which comes after an habendum. Cro. E. 537. Mich. 38 & 39 Eliz. in Cam. Scacc. Woodward v. Parry.

In debt brought by P. for the 14l. judgment was

[ 60 ] given for him. And upon error brought, it was insisted that this was

8. A. B. and C. were bound to J. S. in 400l. by such words, viz. *Obligamus nos ad solutionem predictam & si defecerimus de solutione predicta tunc currat super nos, & quemlibet nostrum pena statuti stupul.* J. S. brought debt against A. only. The defendant pleaded that it was intended to be only a statute, and because it was not sealed in such a manuer as it ought to be, with a seal of two parts, it was void as a statute, and therefore ought not to be sued as an obligation. Adjudged and affirm'd in error by all the Justices, that debt was well brought upon it as upon an obligation, because it never had any effect as a statute. Cro. E. 494. Mich. 38 & 39 Eliz. 544. & Hill. 39 Eliz. B. R. Afcue v. Hollingworth.

Vide (1) pl. 1. and in margin, S. C.

9. *I A. B. do bind myself to C. to pay to him all such monies as D. owes him,* in witness whereof &c. and in the end of the bill underneath was written, that D. owed C. 40 l. and C. averr'd in his declaration, that A. B. owed C. 40l. and judgment pro quer. Cro. E. 561. Pasch. 39 Eliz. B. R. Morgan v. Johnson.

Cro. E. 758. S. C. by name of Johnson v. Morgan. But there the words are, *Be it*.

*known &c. that I A. B. do acknowledge my self to be indebted to C. for all such sums of money as D. my brother in law did owe the said C. A. and avers in fact,* that D. then owed unto him 45l. &c. Walmley and Kingsmill held it to be a good bill, and the action well grounded thereupon, with this averment; for it is thereby reduced to a certainty; and although it be uncertain in the words of the bill, yet when it may be reduced to a certainty, it is well enough: but Anderson and Glanvil e contra, because it ought to be certain what and to whom he owed it: and here to say that he owed that which his brother in law owed is void; for he cannot be indebted for his brother's debts; for the debts of D. are not thereby discharged notwithstanding. But Walmley said, that the words tantamount, that he is indebted in such a sum as his brother in law owed, and yet thereby

thereby the debt of his brother is not determined. And the like Case was adjudged in this Court. Pasch. 29 Eliz. Wherefore, &c. adjournatur.

10. Debt upon a bill, which was, *Memorandum*, that I A. B. do acknowledge myself to owe, and do promise to pay to M. the sum of 10l. at any time after the Feast of St. Bartholomew, whensoever he shall require the same, if M. shall be then in life: for the payment whereof I bind my self, my heirs, executors and administrators to C. by these presents &c. In witness &c. And it was thereupon demurred, and adjudged for the plaintiff; and that it was a good bill to M. by the words in the first part of the bill, and the words which oblige him to C. in the last part of the bill, are void. Cro. E. 886. Hill. 44 Eliz. *Hardman v. John.*

Br. Oblig.  
pl. 63. cites  
22 E. 4. 22.  
The Court  
inclined that  
it was a suf-  
ficient obli-  
gation; but  
quere what  
judgment.  
Comb. 87.  
Pasch. 4 Jac.  
2. B. R. S.  
C. by name  
of Throg-  
morton v.  
the Countess  
of Plymouth.

11. If the words of a bill be, *I shall pay to B. 10l. it is a good ground for an action of debt.* Went. Off. Executor. 116.

12. A. by writing empowered B. to collect and receive his money and rents, and promised to allow him 100l. a year for his pains; and in default of payment, that B. should detain the same; and this was in the words following, viz. *I do direct and appoint B. to take and receive to his own use 100l. of lawful money of England, out of the first money which he shall receive of mine.* It was argued, that it cannot be an obligation; for that it was only a bare letter of attorney and an authority, and no more; for there were no words to oblige A. or which can make a warranty: and therefore if the money was not received, the party to whom the note was given could not resort back to him who made it. But it was answer'd, that when one is indebted to another by simple contract, which is acknowledged by deed, an action of debt will lie against his executor; for any thing which is under hand and seal will amount to an obligation, especially where the debt is confess'd; and that there are words in this deed to shew what money was due, and that makes it a bond: B. had judgment, but the judgment was revers'd on error brought, but for another reason, viz. because it was brought for three quarters salary, whereas the agreement or contract was intire. 3 Mod. 153. Hill. 3 Jac. 2. B. R. *Plymouth (Countess) v. Throgmorton.*

11. Mod.  
218. S. C.  
by the name  
of *Sawyer v.*  
*Mawgridge,*  
and *Holt* and  
*Powell* held  
that the word  
oblige is  
not neces-  
sary; *Powis*  
held, that  
the words,  
v.z. I do  
hereby ac-  
knowledge to &c. were by way of parenthesis; which *Holt* oppos'd. Judgment for the plaintiff.

13. An action of debt on bond; upon oyer craved, it appeared to be thus, *T. M. this is to authorize you to seize and sell so much as will satisfy a debt of 9l. 16s. 6d. which I do acknowledge to owe to you T. M. and to return the overplus,* and this shall be your discharge for so doing &c. After a verdict for the plaintiff, 'twas moved in arrest of judgment, that tho' this seems to be an acknowledgment of a debt, yet 'tis but an authority. 42 E. 3. 9. Per Holt Ch. J. If a man by writing under his hand and seal acknowledge himself to be indebted to J. S. in 1000l. that is an obligation. By the whole Court judgment for the plaintiff. Holt's Rep. 207. Pasch. 8 Annæ. *Mawgridge v. Saull.*

(M) Void.

(M) *Void.* In Regard of the *Words being Insensible, &c.* Vide (D).

1. Obligation was by A. to B. that the obligee *should receive 5 l. by the hands of J. S.* This as to the receiving it by the hands of J. S. or its being to be paid by the hands of J. S. is void, and A. the obligor shall pay it presently. Vide Br. Obligation, pl. 56. cites 20 E. 4. 17.

2. *Know &c. that I A. B. am bound to C. D. in the sum of &c. for the payment of which sum I give full power and authority to the said D. to keep the said sum on the profits of the bailiwick of E. from year to year, until the same be paid.* Per Cur. the plaintiff may bring his action, or levy the debt, according to the clause aforesaid. 4 Le. 208. Trin. 30 Eliz. B. R. Goote v. Winkfield.

3. In debt for 10 l. the plaintiff declared, that the defendant *concessit se teneri per scriptum suum obligatorium &c.* The words of the deed were, *I do acknowledge to Edward Watson by me twenty pounds upon demand for doing the work in my garden.* Upon a demurrer to the declaration, this was adjudged a good bond. Vent. 238. Hill. 24 & 25 Car. 2. B. R. Watson v. Snaed.

4. Debt on bond conditioned, *that if the obligee shall pay 20 l. in manner and form following, viz. 5 l. upon four several days therein named, but if default shall be made in any of the payments, then the said obligation shall be void,* or otherwise to stand in full force and virtue. The defendant pleaded that *tali die, &c. non solvit 5 l. &c.* and upon this the plaintiff demurr'd. It was argued that the first part of the condition is good, which is to pay the money, and the other is surplusage void and insensible; but if it be not void, it may be good by transposing thus, *viz. If he do pay, then the obligation shall be void; if default shall be made in payment, then it shall be good.* The Court were all of opinion, that judgment should be given for the plaintiff; and the Ch. J. said he doubted whether the Case of 39 H. 6. 10. [which see at (N). pl. 1.] was law. 2 Mod. 285. 29 & 30 Car. 2. C. B. Wells v. Wright.

5. An obligation to John Garnes the elder was thus, *viz. Know all men that I P. G. do stand bound (but says not to whom) in the sum of 16 l. and is to be paid to J. G. (the obligee) the elder's executors; for which payment to be made I bind me, my heirs and executors, (but says not to whom).* The condition likewise was long and senseless in divers recitals, and *inter alia* recited a devise of 8 l. by a stranger, to be paid to John Garnes the elder, within one year after his death, *If therefore the said P. G. (the defendant) shall pay to J. G. the elder's executors within one year after his death, the bond shall be void.* Upon demurrer, it was held by some that the words [John Garnes the elder's executors] should be disjoined, and read thus, *viz. (J. G. the elder his executors)* and should be taken

Vide (E)  
pl. 1. Marg.  
S. C.

[ 62 ]

taken [as if the words were] *J. G. the elder and his executors*. Others held that the words (*the elder's executors*) should be wholly rejected as void, and then the words shall be read (*to be paid to John Garne only*); for he cannot have executors in his life, according to Cro. J. 358. GOODMAN v. KNIGHT where the insensible words in an obligation are rejected as void, and the covenant read in the sensible words only; and judgment was given for the plaintiff. Per tot. Cur. 3 Lev. 21, 22. Trin. 33 Car. 2. C. B. Langdon v. Goole.

6. The sum in the obligation was express'd by insensible words, viz. *in premid. vigint.* which being insensible were rejected, the rest being sensible without them, or at least made so, by being explained by the condition. 2 Salk. 462. Pasch. 10 W. 3. B. R. Cromwell v. Grunsden.

### (N) Void. By reason of Mistake in the Words.

S. C. cited in Saund. 66. Pasch. 19 Car. 2. in Case of Butler v. Wigg. S. C. cited Carth. 159. per Bridgman Arg. who said it should have been *if he did*, but we ought to judge according to the purport of the words parol's first plea; and puts Lord Hobart's distinction, that 'tis a legal intent we must go by, and not a mental.—S. C. cited 1 Sid. 106. Hill. 14 & 15 Car. 2. B. R. \* in Case of VERNON v. ALDER. But there, 106. it was adjudged contra; the obligation being, *that if the defendant pay the plaintiff 2 s. per week till the full sum of 7 l. 10 s. be paid, viz. on every Saturday; and if he fail of payment at any one day, that then the bond to be void &c.* The defendant pleaded that he did not pay at such day; upon which the plaintiff demurr'd, and after advisement several terms, it was adjudged that the obligation was single, and the condition repugnant and void. + 1 Lev. 77. S. C. accordingly.—Raym. 68. S. C. accordingly.—Vide (M) Wells v. Wright.—S. P. For when the condition recites a debt (as in this case it did) and after lays an obligation not to pay it, 'tis in that repugnant. 2 Salk 463. Mich. 7 Annæ. B. R. Wells v. Tregusan.

Br. Nugaton, pl. 19. cites S. C.—The solvendum is void, and it shall be intended to the obligee. Arg. Roll. R. 58. cites 4 E. 4.

2. Debt. The obligation was *Noverint universi &c. J. S. teneri & obligari W. in 10 l. solvendum eidem J.* where it should be *eidem W.* and the plaintiff counted solvendum &c. and did not say to whom; and per Cur. he *shall say solvendum to W.* notwithstanding the default in the obligation; for the obligation is *good without any solvendum*, or day of payment, and the solvendum to J. is *surplusage*, and does not make the obligation void. Br. Obligation, pl. 47. cites 4 E. 4. 29.

3. If *I am bound to J. N. in 10 l. solvendum to me*, this solvendum is void, and the obligation good and payable immediately. Br. Conditions, pl. 172. cites 21 E. 4. 36. per Vavisor.

take effect by the premisses, and the solvendum shall be void. Per Glin. Ch. J. 2 Sid. 77. Pasch.

*Mich. 1658. B. R. in Case of Ansty v. Brian.*—For the plaintiff may declare on a solvendum to himself. *Finch. Max. 13, b.*—*Pl. C. 141. b. cites 4 E. 4. 29.*—*4 Le. 248. Arg. cites 4 E. 4. 29. b.*

4. And if obligation be solvendum in *transino de domesday*, it is the like, per Brian. Br. Obligation, pl. 58. cites 21 E. 4. 36.

5. The condition was, *ubereas* the above bounden &c. thall [ 63 ] and will &c. instead of *if*—This is a void condition, the same being altogether insensible and not compulsory as it ought to be, and so the obligation single and without condition. 2 Bull. 133. *Mich. 11 Jac. Marker v. Crofs.*

6. Obligation concludes, that the condition of the obligation shall be void, where it should be the (*obligation*) omitting (condition) yet good. *Sid. 456. Pasch. 22 Car. 2. B. R. Maleverer v. Hawkaby.*

2 Saund. 78.  
S. C. —  
101. 35.  
S. C. —  
Vent. 39.  
S. S. —  
2 Keb. 625. S. C.

## (O) Void. In respect of Omissions of Words. See (E).

1. A Man was bound in writing to deliver 20 quarters of corn to the plaintiff such a day, to the performance of which he bound himself in 100s. and did not say to whom, and yet well, per Car. for it shall be intended to the plaintiff; but, per Littleton, the count ought to be that he bound himself to the plaintiff by these words &c. rehearsing the words of the deed. Br. Obligation, pl. 46. cites 2 E. 4. 20.

In articles between A. and B. 'tis said, *We bind our selves* (without saying to whom) in 200l. to be forfeited

upon due proof of any part of these articles on either side, but did not say upon due proof of the breach of the articles, yet made good by construction. *Lutw. 441. Mich. 1 Jac. 2. Watts v. Pitt.*

2. Debt upon indenture of covenants, made by H. abbaten beate Marie de W. and in the end it was, *ad quas conventiones perimplendas H. abbas de W. obligat se* &c. in 10l. and did not say *predictus H. abbas*, and yet well; for it shall be intended the same abbot who was named before; quod nota. Br. Obligation, pl. 52. cites 11 E. 4. 2.

3. *Ad quam &c. obligo me* per presentes dat. &c. and says not *sigillo meo sigillat. nor in cujus*; yet if a seal be put, the obligation is good; per 2 Justices. D. 19. pl. 113. Trin. 28 H. 8. Anon.

See Faies (H) pl. 9. and thenotes there.— S. P. Dal. 1. pl. 4. cites

S. C.—Cited per Portman J. to have been lately ruled, and says that the words *teneri & firmiter obligari* may be supplied by words purporting the same. D. 22. b. pl. 140.

4. The obligor's subscribing his name to the bond is sufficient, notwithstanding that his christian name is blotted or left blank in the bond. Cro. J. 261. Mich. 8 Jac. B. R. Dobson v. Keys.

5. If a man binds his heirs to pay a sum of money (and does not bind himself), this is void. Arg. Show. 379. Pasch. 4 W. & M. cites Hob. 130. Oats v. Frith.

For no man can charge his heir but as part of himself, and

therefore beginning with himself. Hob. 130. Trin. 12 Jac. Oats v. Frith.

6. If

6. If J. S. be bound in . . . *libris* (with a blank or space), and not shewing in how much, it is not good. Per tot. Cur. quod nota. Yelv. 225. in Case of Logging v. Titherton.

7. Where the *heires* were mentioned only in the condition, and not in the obligation, the Court would not intend a real lien against the heir, tho' he be bound by the obligation of his ancestor unless he be expressly named; tho' otherwise of an executor who has effects; and therefore judgment was arrested. 2 Saund. 136. Trin. 22 Car. 2. Barber v. Fox.

[ 64 ] (P) Where the Obligations are joint or several, or both. Rules, Pleadings &c.

1. WHERE two are bound each in the whole, and are impleaded upon it upon joint *præcipe*, and the one appears, he shall not be compelled to answer without his companion; contra if he had impleaded them by several *præcipes*. Br. Dette, pl. 197. cites 48 E. 3. 1.

2. Debt upon an obligation against N. who said that he and a feme were bound *et uterque in solid'*; the defendant said, that the feme took to baron E. to whom E. the plaintiff has released all actions by the deed which he shewed, judgment &c. and the plaintiff said, that at the time of the making the obligation, the feme was covert of W. so he can never have action against her judgment &c. and the opinion of the Court was, that it is no bar. So of an obligation made by J. and a monk, and the plaintiff releases to the monk. Br. Dette, pl. 73. cites 14 H. 4. 29.

3. In debt upon an obligation the defendant pleaded to the writ, that J. S. was bound with him not nam'd &c. and the plaintiff said that J. S. was within age &c. the defendant was compelled to answer alone. Br. Dette, pl. 75. cites 14 H. 4. 32.

4. In debt upon a bond against A. it is a good plea to the writ, that he and N. were joint obligors, without any traverse that he was obliged alone. Br. Bricf, pl. 179. cites 22 H. 6. 4.

5. So in debt against a prior, to say that he and the convent made the bond without any traverse. But Brook says, it seems that if it was in bar, as it is to the writ, he ought to traverse it. Br. Ibid.

6. In assise. Where a man is bound to two, the one dies, the other brings action, and he declares that the other is dead; this is sufficient, tho' he does not say before the writ purchased; for if it be otherwise the defendant may allege it; per Newton. Br. Count, pl. 38. cites 22 H. 6. 11.

7. In debt against J. N. upon a bond, and he demanded oyer of it, and had it, in which were two other obligors; by which he demanded judgment of the count, because it was a joint bond, and the others were not named, & non allocatur; by which he said that it appeared by the bond, that the other two are bound who are not named, judgment of the writ, & non allocatur; for this

is no form of pleading, but *shall say in fact, that he and the other two made the bond, who are alive not named, judgment of the writ; quod nota.* Br. Brief, pl. 26. cites 28 H. 6. 3.

8. Where there are two joint obligors, and the obligee gives a longer day of payment to one of them, and in the mean time sues the other, a subpoena may be brought by that other; for it is for the same debt, and if the one had paid all, or if the obligee had agreed to accept the money from one who is indebted to one of the obligors, the other joint debtor shall have advantage thereof; per the Ld. Chancellor. Br. Conscience, pl. 3. cites 9 E. 4. 41.

9. If three are bound & *quilibet in toto*, and one is impleaded for the debt, and the plaintiff recovers, and after impleads another of them, the first recovery is no bar; for it is no satisfaction; contrary if the plaintiff takes execution by the recovery; note the diversity. Br. Jointenants, pl. 31. cites 4 H. 7. 8.

10. If four are bound by obligation jointly, & *uterque eorum per se*, the obligee may charge any of them by themselves severally; but if he impleads two of them they may abate the writ; for if he will charge any of them jointly, he ought to charge all the four. Br. Obligation, pl. 94. cites 10 H. 7. 16.

S. P. And this was pleaded in abatement of the writ after they were out-

laved, and had such charter of pardon and scire facias upon it, and there pleaded this upon the first original. Br. Dette, pl. 69. cites 12 H. 4. 21.

11. J. S. master of the fraternity of D. and his confreres grant [ 65 ]  
10l. annuity to A. *solvendum &c.* In cuius rei testimonium, J. S. the master, and confreres put their common seal, and the said J. S. *figillum suum apposuit &c.* A. shall have action against the corporation only; for tho' the master might charge himself alone, by reason of his 2 capacities, yet this does not charge him alone, because all are the words of the corporation, and no several words by him only; and where the words are joint, the several sealing will not make an obligation several. Br. Facts, pl. 106. cites 10 H. 7. 16. pl. 15.

12. *Sigillo suo figillat.* may be referr'd to both their seals, and both may use one seal. Cro. E. 247. Mich. 33 & 34 Eliz. C. B. Bretton v. Bolton.

13. An obligation was entered into by three to J. S. which tho' it was in the nature of a statute-staple, yet for want of being sealed with a seal of two parts, was sued as an obligation against one only. It was objected, that tho' it be an obligation, yet it being jointly entered into by three, therefore one cannot be sued without the other. But it was resolved and affirmed in error that debt lay upon it, and that the declaration against one of the obligors only was good enough, altho' the words of the obligation are joint; because it does not appear that the other two did ever seal it, or that they are alive, which ought to be shewn by the defendant, & so he has the advantage; for otherwise the Court will not intend

Sid. 420. S. P. and that it seems judgment shall be for the plaintiff, and that the declaration is good, and it shall come of the other part to swear that there is another named in

the bond, intend it. Cro. E. 494. Mich. 38 & 39 Eliz. and Hill. 39 Eliz. who is not named in B. R. Afcue v. Hollingworth.  
the writ. Trin. 21 Car. 2. B. R. Chappel v. Vaughan—At another day it was adjudged for the plaintiff; but defendant might have pleaded his special matter in abatement. Ibid.

14. If two are bound severally and jointly to me, and I sue them jointly, I may have a *capias* against them both, and the death or escape of one shall not discharge the other; but I cannot have a *capias* against one and another sort of execution against the other; because tho' they are two several persons, yet they make but one debtor when I sue them jointly. But if I sue them severally, I may sever them in their kinds of execution; for tho' the obligation be but one, yet the originals, the suits, pleadings, judgments, and executions are so divers as if they were upon several obligations; but yet so as if a very satisfaction be had of one, or against the sheriff on an escape of one, the rest may be relieved on an *audita querela*. Hob. 59. in Case of Foster v. Jackson.

15. Debt for 91*l.* 12*s.* 8*d.* upon a bill obligatory, dated 1st May 8 Jac. solvend 1st November following: the defendant demands oyer of the bill, which is entered in *hæc verba*; Be it known that J. W. C. do acknowledge my self to owe, and to be indebted to J. F. and W. S. in the sum of 91*l.* 12*s.* 8*d.* to be paid the first of November following; for which payment to be made, I bind myself to J. F. in 100*l.* dated &c. And it was thereupon demurred; and whether F. ought to bring the action for the 100*l.* or both of them for the 91*l.* 12*s.* 8*d.* was the question; et adjournatur. Cro. J. 291. Trin. 9 Jac. Foxhall and Sands v. Corderoy.

16. If three are bound, and the action is brought against two, the plaintiff ought to shew that the third is dead. 2d. If two or three are bound, and one dies, the action cannot be brought jointly against the survivor, and the executor of him that is dead. But if three are bound jointly, and action is brought against two without speaking of the third, it was doubted if it be not good; for it may be that the third never sealed. 3d. If obligation be made to three, and two bring action, they ought to shew that the third is dead. 4th. If two or three are bound jointly, and one dies, the executor of the deceased is utterly discharged. Sid. 238. Hill. 16 & 17 Car. 2. B. R. Osborne v. Croßbern, & al.

17. In debt on a bond against one, it appeared that another was bound with him, and for that reason the defendant demurred, but adjudged for the plaintiff; for the defendant cannot demur in such case, unless the other obligor be averr'd to be living, and also that he sealed and delivered the bond. Vent. 34. Trin. 21 Car. 2. B. R. Cabel v. Vaughan.

\* Sid. 420.  
Trin. 21  
Car. 2. B.  
R. S. P. in  
Case of  
Chappel v.  
Vaughan.

S. P. But  
defendant  
might have  
pleaded his  
[ 66 ]  
special mat-  
ter in abate-  
ment. Sid.  
421. S. C.  
by name of Chappel v. Vaughan—1 Saund. 291. S. C. acc.—Where plaintiff declares against one upon a deed, by which it appears that another was bound with him, it shall not be intended that the other sealed unless averred on the defendant's side; otherwise where the declaration is upon

matter



*solvend' to C. who is a stranger, a payment to C. is a payment to B. And in an action upon* [ 67 ] *it, the count must be upon a bond solvend' to B. Arg. 6. Mod.*

228. Mich. 3 Ann. B. R. in Case of Roberts v. Harnage.—cites 4 E. 4. 19. 2 Keb. 81.—And per Cur. if A. makes a bond to B. *solvend' to such person as B. shall appoint.* If B. does appoint one, payment to him is a payment to B. and if B. appoints none, it shall be paid to B. himself. *Ibid.*

2 Keb. 81. S. C. and that the Court inclin'd that there are sufficient words of obligation, and that the Queen might declare on an obligation generally to herself, notwithstanding the payment be to another for her use.

2. A. was bound to the Queen *solvend' to J. K. to the use of the Queen.* In debt brought upon this bond the defendant demurred; and it was said, that the *solvend'* to the stranger is void, as well as if it had been to the obligor himself; and the Court inclin'd that judgment should be for the plaintiff for this reason; but adjournatur. Sid. 295. Trin. 18 Car. 2. B. R. The Queen Mother v. Challoner.

6 Mod. 228. S. C.

3. A. is bound to B. in 40*l. solvend. to his attorney* or his assigns. This bond was declared upon as payable to A. himself, and held good; for teneri made it a debt to A. and consequently it may be paid to him; a *solvend'* to any body else would be repugnant. 2 Salk. 659. Mich. 3 Ann. B. R. Roberts v. Harnage.

### (R) Forfeited or discharg'd by what Entry, Eviction, &c.

*For an obligation cannot be apportion'd; for where he is bound in 10*l.* to pay 4*l.* and he pays 3*l.* and not 4*l.* the obligation is forfeited. Ibid. —Brook says it seems*

there that if the entry had defeated the estate of the plaintiff in the whole, that then the obligation had been discharged in all. *Ibid.*

1. DEBT upon an obligation for payment of rent reserved upon a lease for years made by the plaintiff to the defendant; the defendant said, that before that the plaintiff any thing bad, J. N. was seized and had issue the plaintiff and two other daughters and died; and the plaintiff entered into all and leased to the defendant rendering the rent, and he was bound to pay it, and before any day of payment the two other daughters enter'd, judgment si actio. And the best opinion was, because by the entry into two parts, the rent shall be apportioned, and the defendant has not paid the third part of the rent according to it, therefore the obligation is forfeited. Br. Obligation, pl. 6. cites 20 H. 6. 23.

2. Oblations were leased which were after resum'd, and admitted that this is a good plea in bar in debt upon an obligation for performance

performance of the covenants in the indenture of lease on the part of the lessee. Br. Obligation, pl. 39. cites 21 H. 7. 6.

3. If a man be bound to pay the rent reserved upon such a lease for years made of the land by the obligee to the obligor; if the obligee enters into parcel of the land, the obligation is discharged for the non-payment during this time. Br. Obligation, pl. 76. cites 4 H. 7. 6. per Brian and Keeble.

4. If a man be bound in a bond depending upon covenants, or upon a lease, if he can avoid the lease or covenants, then this is an avoidance of the bond. Br. Obligation, pl. 88.

5. Bond to perform covenants in a lease, one whereof was to pay the rent at the day.—Debt was brought for non-payment of the rent.—By the recovery the obligation is determined. Cro. E. 332. Trin. 36 Eliz. B. R. Andrews v. Wood.

6. Judgment is a good plea in satisfaction of a bond; per Cur. 12 Mod. 248. Mich. 10 W. 3. Roe v. Nedham.

(S) Assignment of Obligations.

[ 68 ]

1. AFTER assignment of a bond, the money in equity is the assignee's, and payment to the obligee after notice of the assignment is not good. 2 Vern. 540. Hill. 1705. Baldwin v. Billingsley.

2. J. gave bond to the defendant C. of 250 l. for payment of 120 l. The defendant assigns that bond to the plaintiff in satisfaction of a debt of 56 l. and to indemnify him against a bond he was bound in as surety for the defendant C. and at the same time the plaintiff C. gave a note to the defendant to indemnify him against a debt of 50 l. to Jewel, in which the defendant C. was bound as surety for the plaintiff. Lord Chancellor decreed the plaintiff to have the benefit of the bond, and thereout to discount the debt to Jewel, the note being (as he said) in the nature of a defeasance to the bond; and although the assignee comes in upon a full and valuable consideration, yet he must take the bond subject to the same equity, as it was in the obligee's hands. 2 Vern. 692. Trin. 1715. Coles v. Jones and Coles.

A bond is assignable only in equity, and when assigned is liable to and attended with the same equity as if remaining with the obligee. 2 Vern. 765. Mich. 1718. Turton v. Ben-son.

(T) Agreement. In what Cases the Condition of a Bond being to do some Act, it shall be decreed to be executed in Specie, or only as a Condition.

1. AFTER the statute of 32 H. 8. a tenant in tail binds himself by obligation or recognizance not to make a lease for 21 years or three lives; if he makes such lease it shall be good, but the bond or recognizance is forfeited. Jenk. 120. pl. 41.

2. An agreement contained in the condition of a bond, shan't be turn'd A bond of the penalty

of 5000*l.* turn'd into a collateral execution, by decreeing the land. Ch. Cafes 188. Mich. 22 Car. 2. Bagg v. Foster.

10 J. S. in consideration of J. S. marrying A.'s daughter to settle one third of whatever estate should come to him upon the death of A.'s father upon the said J. S. and his daughter, within three months after his the said A.'s father's death. The father of A. died, and the third part of the estate which came to A. was 1600*l.* per ann. Parker C. decreed, that the condition of the bond should \* be specifically performed; for the design of this agreement, of which this bond was an evidence, was to make a lasting provision, which could never be satisfied by the forfeiture of the penalty, which in such case would be all the husband's, and so no provision for the wife or children. 10 Mod. 511. Hobson v. Trevor—2 Wm's Rep. 191. Mich. 1723. S. C.—\* S. P. 10 Mod. 462. Mich. 6 Geo. 1. Blundel v. Barker.

9 Mod. 62.  
S. C. Ali-  
son's Cafe.  
—2 Vern.  
394. Gar-  
diner v.  
Pullen.  
Mich. 1700.

3. The authorities are many in this Court, that bonds have been considered as evidences of agreement, and obligors held to a specifick performance, and not allowed to forfeit the penalty; per Parker C. 10 Mod. 518. Mich. 10 Geo. Parks and Wilson.

[For more of Obligation, see Assignment, Conditions, Grants (G), and other proper titles.]

[ 69 ]  
Fol. 150.

## Occupant.

### (A) Occupant. Of what Estate.

2 Roll. R.  
123. contra  
Arg. and no  
objection  
to it.

[1. IF tenant by the curtesy, or tenant in dower grant, over their estate, and grantee dies during the life of cesty que vie, there shall be an occupant, though the estate be created by the law. Co. Litt. 41. b.]

[2. If lessee for life leases to the lessor in reversion in fee, and to the heirs of his body for life of the lessee, and after lessor dies living the lessee, the heir of the body shall be a special occupant; for this was not any surrender. 18 E. 3. 44. b.]

[3. If tenant for life surrenders to the remainder in tail, who dies during the life of the lessee, there shall not be any occupancy; for by the surrender the estates were conjoin'd. Contra. 42 E. 3. 10.]

[4. If remainder in fee enters, and be an occupant, he shall be said an occupant during the life of cesty que vie. 42 E. 3. 10. may be collected.]

S. C. cited  
4 Rep. 73.  
b. in Bo-  
rough's  
Cafe.

[5. If a man leases to two for their lives, & diutius eorum vi-venti, and after the lessees make partition, and then one dies, yet there shall not be any occupancy of his estate; but the lessor may enter; for the words (et diutius eorum viventibus) are void, not

not being more than the law says, and by the partition the jointure is sever'd. 30 Aff. 8. adjudged.]

6. A lease is made to J. S. *to hold to him and his assigns for his own life, and for the life of A. and B.*—The question was, If his estate was determined; because one cannot have a greater estate of freehold than his own life. But Anderson and the whole Court held clearly, that it is a good limitation, and he has an estate for all their three lives; for though he himself cannot have an estate but for his own life, yet he may have it to grant to another, and the habendum for their three lives is a good limitation, and by his death the estate is not determined, but occupanti conceditur. Cro. E. 182. Pasch. 32 Eliz. B. R. Utty Dale's Case—alias Uvedale's Case.

S. C. cited Cro. E. 491. Mich. 38 & 39 Eliz. in Case of Roper v. Ardwick.

7. Father had estate for his *own and his two sons lives*; he assigns it to trustees to the use of himself for life, remainder to his wife for life, (if his two sons live so long) remainder to the use of one of the sons and his heirs. The question was, Whether after the wife's death it shall *revert* to the father, or the *surviving trustee* shall have it, or the *heir* shall be special occupant. Cart. 46. Trin. 17 Car. 2. C. B. Tinker v. Lidcott.

Bridgman Ch. J. said, when the father had an estate for three lives, and he conveyed the land after to the use of

himself for life, and to his wife for life, during the lives of his sons &c. why should not all go out of the father, as in CHUDLER'S Case? Ibid.

8. No occupancy shall be of *copyhold, without special custom.* 6 Mod. Mich. 2 Ann. B. R. Smartle v. Penhallow.—1 Salk. 188. S. C.

If copyhold tenant *par auter vie* dies, there shall be no

occupant, but the *lord shall enter.* 1 Salk. 188. S. C. —Noy. 47. S. P. in Case of Salter v. Butler.

## (B) *Against whom* there shall be an Occupant upon [ 70 ] the Estate.

[1. **A** *Gainst the King* there shall not be any occupant; because *nullum tempus occurrit Regi*, and therefore no man shall gain of the King by priority of entry. Co. Lit. 41. b.]

Of an estate which a man has by letters patents of the

King, there shall not be any occupancy. Arg. 2 Roll. R. 123. Mich. 17 Jac. in Case of Skelton v. Hay.

[2. If *lessee for life enters into religion*, there shall not be any occupancy; but *lessor may enter*, because he is dead in law. 18 E. 3. 48. b.]

[3. But if *lessee for life grants over his estate and then enters into religion*, it seems that there shall be an occupancy; for otherwise he may by his own act defeat his own grant, as Litt. 96. If disseisor enters into religion, the descent to his heir shall not take away an entry.]

(C) General. *Of what Thing it may be.*

Vaugh. 190. in Case of Holden v. Smallbrook. — The sole means that the law gives to one to gain an estate by occupancy, is by entry; but no entry can be in an *advowson*; rent, or any other thing that lies in grant. Bridgm. 94. Arg. cites 20 Aff. 38. 12 H. 7. 16. — See Vaugh. 187 to 206. Holden v. Smallbrook.

Mo. 664. — [2. There cannot be a general occupant of a rent. Contra 33 Yelv. 9. Aff. 4.]

2 Roll. R. 123. S. P. Arg. — For none can make a title to a rent to have it against the tertenant, unless he be party to the deed or conveys a sufficient title under it. Cro. E. 901. Mich. 44 and 45 Eliz. B. R. Salter v. Butler. — Rent was granted to A. for 3 lives, who dies without disposition living *cestui que vie*; grantor shall hold the land discharged, because occupancy can't be of a rent; for it can only be of lands which pass by livery, whereby the freehold passed, and shall not revert again till the limitation be determined, and it is for the sake of a praecept of a stranger. 6 Mod. 68. Mich. 2 Annæ B. R. Agreed, in the Case of Smartle v. Penhallow.

[3. A feme tenant for life of a copyhold, the reversion being granted over to B. for life, remainder to C. for life cum acciderit post mortem sursum-redemptionem vel forisfacturam of the feme, and after baron surrenders to the use of B. for his life, to whom the lord grants it for his life, and so he is admitted tenant, and after dies. In this case C. shall not have it; because his estate is not to commence till after the death, surrender, or \* forfeiture of the feme, and the feme here is alive, and has not made any surrender or forfeiture, and the feme has right to it by plaint in nature of *cui in vita*; but the lord in this case may retain it in his proper hands, or disposition, during the life of the baron, as an occupant. D. 9 E. 264. f. 38.]

\* Fol. 151.

4. No occupancy shall be of a rent, nor of an estate created by law. Arg. Bull. 136. cites 15 E. 3. F. tit. Sci. Fa. pl. 17.

5. Rent was granted to 2 for life of J. If they die living J. the rent is extinct; for there is no general occupant of rent; but if they had granted their estate to M. there M. shall have this [ 71 ] living J. D. 186. pl. 1. Marg. cites Mich. 41 & 42 Eliz. per Walmley and Anderson in Crawley's Case.

1 Falk. 188. S. C.

6. No occupant can be of copyhold without special custom. Agreed. 6 Mod. 68, Mich. 2 Annæ B. R. Smartle v. Penhallow.

\* This in Roll is (O).

\* (D) Special, *of what Thing it may be.*

[1. A Special occupant may be of a rent. 18 E. 3. 44. b. 33. Aff. 4.]

Mo. 664. pl. 807. Trin.

[2. As if a rent be granted to another and his heirs for the life of J. S. his heir after his death shall have this rent as special occupant.

occupant. P. 7 Jac. B. per Curiam, between Whiskings and 44 Eliz.  
Davie.] B. R. S. P.  
in Case of

*Salter v. Butler*—Per Fleming Ch. J. In such case the heir takes not by descent, but as heir nomination, and by limitation only. Bull. 135. *Bowles v. Poor*.—Ibid. 137.—Cro. J. 282.  
Trin. 9 Jac. B. R. S. C.

[3. If an annuity be granted to another and his heirs for the life of J. S. if the grantee dies during the life of J. S. his heir shall have the annuity. 19 E. 3. 56. Agreed.]

## \* (E) Who shall be said to be the Occupant.

\* This in Roll is (F).

[1. IF *tenant pur auter vie* makes lease for years and dies, the lessee for years being in possession shall be the occupant, and his lease is extinct. M. 10 Ja. B. R. per Curiam, between Chamberlayne and Ewer.]

If tenant pur auter vie makes a lease for years, the remainder

for years, and tenant for years enters, and then the tenant pur auter vie dies, here the tenant for years shall be an occupant, and yet his term for years is not drown'd by reason of the mesne remainder for years; for in some cases a term for years and a freehold may well stand together in one and the same person. Per Williams J. 2 Bull. 12. in Case of Chamberlain v. Ewer.—Wals. Comp. Inc. cap. 42. pag. 815.—Lessee pur auter vie leases at will to some covert; lessee pur auter vie dies; her baron shall be occupant. Per Twissden. Sid. 347. Mich. 19 Car 2. Geary v. Bearcroft.—Lessee at will shall be occupant. 2 Roll. R. 123. Skellikorne v. Hay.—Cro. J. 554. Skelliton v. Hay.

[2. If a man leases for years, and after by covin, to the intent to extinguish the lease, makes lease to an ancient man pur auter vie who dies, it seems the lessee for years shall be occupant. But it seems by reason of the covin, that his lease for years shall be said to be in esse against the lessee. M. 10 Ja. B. R.]

2 Brownl. 201. S. P. cites it as 18 Eliz. Adams's Case.

[3. If lessee pur auter vie leases for years, and lessee for years makes lease at will, and after lessee pur auter vie dies, the lessee at will being in possession shall be the occupant, and not the lessee for years; but he shall have it in nature of a reversion, and so the lease for years is not extinct. Mich. 10 Ja. B. R. adjudged between Chamberlayne and Ewer.]

D. 328. b. pl. 10. Mich. 15 and 16 Eliz.—Palm. 42. Bowyer v. Ewer.—Vern. 234.

*Ragget v. Clerk*.—\* S. P. and he need not make claim; for he has the occupation of the land; and this differs from the case where a man comes casually to the land, or hawks there; for they are not any occupancies; per Crooke, Doderidge, \* and Haughton. J. 2 Roll. R. 123. Mich. 17 Jac. Skellekorne v. Hay.—S. P. Cart. 59. 61.—S. P. The freehold by operation of law is cast upon him; but this he shall hold and enjoy subject unto the lease for years; because he cannot have and enjoy this estate of freehold but in the same manner as the tenant pur auter vie held and enjoy'd the same, and he held the same subject to the lease for years; but if there had been no lease at will made, then by the estate of occupancy falling upon the termor for years the freehold is presently in him by operation of law, and so by this the term for years is drown'd, extinct and gone. 2 Bull. 12. Chamberlain v. Ewer.

[4. If *tenant pur auter vie* dies, and J. S. first enters and claims in the right of J. D. yet he himself shall be the occupant; for the law vests the occupancy upon him who first enters, which cannot be devested by the act of the party en Pais. M. 10 Ja. B. R. per Curiam, between Chamberlain and Ewer.]

[ 72 ]  
S. P. per Vaughan Ch. J. and cites S. C. Vaugh. 195. in case of Holden v. Smallbrook.

5. Administrator can't be an occupant of a rent-charge pur auter

Cro. E. 907. *vis*, but after the death of the grantee it passes to the benefit of Mich. 44 & the tertenant. But if grantee had *assign'd* the rent &c. the assignee should have had it during the life of cesty que vie. —Yelv. 9. Noy. 47. in case of *Salter v. Butler*. S. C. and that it cannot come to the executor or administrator; for it was not a thing testamentary, but frankfeutement.

6. A tenant for life granted by fine his estate to B. and by indenture limited the use to B. for the life of A. and B. and if he died living A. then to remain to C. — B. died living A. — C. entered and let to D. for years, and died, living A. — C. shall have this as an occupant, and his lessee shall hold as an occupant, and A. has no residue of the use in him. Cro. J. 200. Mich. 5 Jac. B. R. *Castle v. Dod*.

7. Tenant pur auter vie of a *prebend*, consisting of house, barn, glebe and tithes, *leases it for a year* and dies leaving a wife; J. S. entered and claim'd. — The wife enter'd and claim'd; *lessee for a year attorned to the wife*, and afterwards continuing possession, assigns all his estate in the premises to the plaintiff J. S. Adjudged for the wife against J. S. per 3 J. v. Vaughan Ch. J. Vaugh. 187 to 205.

8. If tenant pur auter vie be disseised and die, *disseisor* shall be an occupant; per Brown J. Arg. Cart. 61. Per Tirrel J. if A. disseise B. tenant pur auter vie, he shall not be occupant. Cart. 61. — per Croke J. contra, and Doderidge J. seem'd to agree that disseisor should be occupant. 2 Roll R. 123. cites 19 H. 6.

Per Bridgman Ch. J. according to Brown J. Cart. 64. — If tenant for three lives makes a lease for years, and the lessee for years is ousted, and after the tenant for three lives dies; here the disseisor shall be occupant, and the law will now turn his wrongful estate, which he had by the disseisin into a rightful estate as an occupant. 2 Buls. 12. *Chamberlain v. Ewer*.

If tenant pur auter vie be disseised and dies, the fee simple here which he had gain'd by disseisin is converted and changed into a rightful freehold, and that by operation of law, settling now the freehold in him as occupant, and this is warranted by the book of 38 H. 6. 28. per William J. 2 Buls. 12. in *Case of Chamberlain v. Ewer*.

\* This in Roll is (Q).

\* (F) Of what Estate it may be. [Special.]

There shall be no occupant of an estate of tenant by the curtesy or dower which are estates created by law. Cro. E. 58. cites it as *Delapet's Case*.

[1. IF tenant by the curtesy grants his estate to another and his heirs, and grantee dies, his heir shall be a special occupant of this estate, 27 Aff. 31. admitted as I take it, that the grant over was so; for it is admitted that the heir of the grantee shall have the land.]

S. P. by Anderson & Pernam. Cro. E. 182. Pasch. 32 Eliz. B. R. in *Utty Dale's Case*. — D. 328. b. Marg. pl. 10. cites same year, and seems to mean the S. C.

2. Tenant pur auter vie makes lease for years to commence from his death; a stranger enters; tho' the stranger is occupant of the freehold, yet lessee for years shall enter upon him, and the lease shall bind the occupant: agreed. Lev. 201. in *Case of Geary v. Barecroft*.

3. So if tenant pur auter vie leases for years, in trust for himself for life, and after in trust for his wife for her life; and the lessee for

for years actually enters, but permits the baron to enjoy it, who dies, and \* then the feme enters. The feme shall be occupant and not the lessee for years. And so a judgment given in C. B. contrary to the opinion of Bridgman Ch. J. was affirmed per 3 J. absente Keyling Ch. J. Lev. 202. Geary v. Bearcroft.

Sid. 346.  
S. C. in  
B. R.—  
Cart. 57.  
S. C. argued  
by the Court  
in C. B.

4. The custom of a manor was, that every customary copyhold of that manor might be granted to three persons, habendum to them, *successive sicut nominantur & non aliter*. A surrender was made to J. S. and his assigns for his own life, and the lives of two others. Powel J. seemed to incline that if J. S. had become bankrupt, and the estate assigned, and the assignee had died, living the copyholder; the lord should immediately have the land; and Powis J. thought that upon the death of the copyholder the estate of assignee would determine, tho' the cesty que vie were living. But it was agreed, that if the grant had been to J. S. for the lives of B. C. and D. and J. S. had died; the lord should have the land again, tho' against his own limitation, because there can be no occupant of a copyhold estate without a special custom, and this would be no mischief, the failer being on the side of the grantee only. 6 Mod. 63. 68. Mich. 2 Ann. B. R. Smartle v. Penhallow.

## \* (G) Who may be a special Occupant.

\* This in  
Roll is (R).

[1. ] If lessee for life leases to another, and to the heirs of his body for life of the first lessee; in this case the heir of his body shall be occupant after his death. 18 E. 3. 44. b.]

[2. If a man leases to another and his executors land for life of J. S. and cesty que vie dies, the executors shall be a special occupant (tho' it be a franktenement). D. 16 El. 328. 10.]

See this  
Case D.  
328. b. pl.  
10. Mich.  
15 & 16

Fliz. where this point seems not to appear clearly; but it says, that livery of seisin was made according to the habendum.

[3. If a man grants a rent to another, his executors and assigns for the \* life of J. S. and after the grantee dies, making an executor but no assignee, the executor shall not be a special occupant; because it is a franktenement, which cannot descend to the executor. Tr. 3 Car. in Chancery, between Sir Richard Buller and Emelin Cheverton plaintiffs, and Isabel Cheverton defendant, agreed and admitted by Justice Jones and the Court, and by the counsel of both sides, and that the rent was extinct.]

\* Fol. 152.  
S. P. Mo.  
664. pl.  
807. Trin.  
44 Eliz.  
B. R. Salter  
v. Boteler.

4. Rent is granted to A. and B. during the life of C. to the use of C.—A. and B. die. Per Cur. the rent continues to C. for the use is vested by 27 H. 8. D. 186. a. pl. 1. Marg. cites Mich. 41 & 42 Eliz. Crawley's Case.

But in D.  
186. pl. 1.  
Mich. 2 &  
3 Eliz. the  
Court in-  
clined that

the estate was determined by the deaths of A. and B. inasmuch as the estate, on which the use was raised and created was gone, by which &c. But adds a quere if the estate was made before the 27 H. 8,

5. If grantee *pur auter vie* of a rent-charge had *devis'd the rent-charge*; the devisee should have had the rent during the *auter vie*; per Gaudy and Fenner, but Popham contra. Noy 47. in Case of Salter v. Butler.

## [ 74 ] (H) The Reason and Original of Occupancy.

Occupancy is only to supply a freehold, per Holt Ch. J. 1 Salk. 189. *Smartie v. Penhallow*.—For should the freehold continue in *abeyance*, no action could be brought during all that time, be it ever so long; nor trial had by him that had right to recover the freehold and inheritance; per Tirrel J. Cart. 61.

1. IT is only for necessity and to avoid a greater mischief; per Brown J. Cart. 60.

2. The law of occupancy is *founded upon the law of nature*, viz. *quod terra manens vacua occupanti conceditur*. So as upon the first coming of the inhabitants to a new country, he that first enters upon such part of it, and manures it gains the property (as is now used in *Cornwall &c.* by the laws of the Stannaries) so that it is the *actual possession and manurance* of the land, which was the first cause of occupancy, and consequently is only to be gain'd by actual entry. Sid. 347. *Geary v. Bearcroft*.

3. The true ground of occupancy is, that *anciently all titles of titles were by real actions*, and therefore he that had the freehold was one to whom the law had a special regard. The *ancient law* for many respects *did not allow leases for above 40 years*, till 21 H. 8. 15. per Bridgman Ch. J. Cart. 65. Pasch. 18 Car. 2. C. B. in Case of *Geary v. Bearcroft*.

4. And another thing was, there was reason too, that not only he that had right paramount might know how to try his action, but that the *lord might know how to avow for his services* (which were considerable things formerly), he ought to know who was his tenant; and therefore the law provided there should be a person on whom he should avow; per Bridgman Ch. J. Cart. 65. in Case of *Geary v. Bearcroft*.

5. The subject and object of the occupant are only such things as are capable of occupancy, and not the freehold at all; into which he neither doth nor can enter; but *the law casts the freehold immediately upon him that hath made himself occupant of the land or other real thing whereof he is occupant, that there may be a tenant to the præcipe*; per Vaughan Ch. J. Vaugh. 195. Hill. 19 & 20 Car. 2. in Case of *Holden v. Smallbrooke*.

## (I) Actions. What Actions lie against him.

S. P. Co.  
Lit. 44. b.

1. IT was resolved that an occupant shall be punished for *wast*, because he has the estate of the lessee for life; for the statute of Gloucester cap. 5. gave action of wast against him who holds in any manner for term of life, or for years; and *occupant holds*

holds for term of life. 6 Rep. 37. b. Trin. 3 Jac. B. R. The Dean and Chapter of Worcester's Case.

## (K) Pleadings.

1. IF *he in reversion* enters after the occupant, and brings an action against him, the occupant ought to *plead* the lease to *cestuy que vie* whose estate he hath; but for a rent or an estate that lies in grant, *none can plead a que estate*, but ought to intitle himself by the grant. Arg. Bridgm. 94. Hill. 13 Jac. in Case of Mande v. French.

## (L) Acts of Parliament.

[ 75 ]

1. BY 29 Car. 2. cap. 3. f. 12. *any estate pur auter vie, if not devised shall be chargeable in the hands of the heir if it come to him by a special occupancy as assets by descent, else it shall go to the executors, and be assets in their hands.*

See Estate (Q. 2. 3.)—  
A title under an occupant of a life for the lives

of B. and C. is good; for the statute did not take away all occupancy, but transferred it to executors; and the occupant by his entry on the land is *executor de son tort*; because the statute made it assets; per Holt Ch. J. Carth. 166. Mich. 2 W. & M. B. R. in Case of Bradburn v. Kennerdale.

## (M) Equity. Relief.

1. A. Conveyed lands to W. R. and W. S. and their assigns to the use of them, their heirs and assigns during the lives of the said A. and M. his wife, and the longer liver of them; proviso if A. pay to B. (who after died intestate) 120*l.* in February 1628. then the estate to be void, and A. to re-enter. The 120*l.* was not paid; so as the estate became forfeited. C. having paid divers debts for B. the said W. R. and W. S. were ordered to convey their interest to C. which they did. C. died, leaving D. her executor, who was settled in the estate by order of the Court; but there being no decree in the cause, D. exhibited his bill to have the estate confirmed to him by decree. The Court with advice of Judges, and view of precedents, whereby in some special cases, the Court hath ordered the possession against an occupant, did declare that tho' in case of an occupant upon a general trust, this Court was doubtful how to decree any thing upon a matter of equity in opposition to a ground or rule of law; yet this case differing from a general trust upon an estate granted *pur auter vie*, as the same is a conditional estate *pur auter vie* granted as a security or pledge for a debt, which not being paid, the estate by forfeiture becometh assets in the plaintiff's hands to pay the debts of B. the Court decreed the lands absolutely to D. and his assigns, during the continuance of the said estate, for satisfaction of B's

B.'s debts, and the tenants to attorn, nisi causa; and none was shewed. Chan. Rep. 39, 40. 5 Car. 1. Tophorne v. Gilbie.

In the Case of the Duke of Devon v. KINTON, the Lord Chancellor took it, that before the statute of frauds and perjuries, if an estate per auter

2. A. being indebted, B. became *surety* for him. A. died, B. brought a bill against A.'s widow, suggesting that she had sufficient of her husband's estate to discharge the debts, and *prayed to have leases pur auter vie, whereof A. the testator was seised at the time of his death*, and on which the widow entered as an occupant, *to be assets in equity*. But the Court in respect the plaintiff did not get a case made of this point by such a time discharged the defendant of any further demands from the plaintiff. Chan. Rep. 59. 8 Car. 1. Throgmorton v. Wagstaff.

*vic came to an executor or administrator* it would be assets, and decreed accordingly. 2 Vern. 719, 720. Mich. 1716. Case 638.

Freem. R. p. 213. pl. 384. Mich. 1675, seems so to be S. C. which was

3. A title under an occupant set forth by the plaintiff was *demurred to*, and allowed; because this Court will not countenance nor give any relief thereto. 2 Chan. Rep. 112. 27 Car. 2. Price v. Evans.

a bill by occupant *for the conveyances belonging to the estate*.

It was said for the defendant, that it was not proved in the cause, that there was any deficiency of assets; but if it had, yet this occupancy happening

4. A. seised of a parcel of land for his own life, and the lives of B. and C. *prevailed with R. to be bound with him for a sum of money*; and that R. might raise money for the discharge of the said debt, he *permitted R. to enter into the said lands, and take the profits for two years*, the said lands being about 12l. yearly value, and the said land being so in A.'s possession *A. died*, and made E. his wife his executrix. E. brought a bill to have an account of the profits, and that the possession of the land should be delivered up to her; R. by plea set forth his title as occupant, and it was allowed, and the bill dismissed. Pasch. 36 Car. 2. 2 Vent. 364. Ragget v. Clark.

before the statute of frauds and perjuries, the estate was nowise subjected to the payment of debts, and of that opinion was the Lord Keeper, and therefore dismissed the bill. 1 Vern. 234. S. C.

[For more of Occupant in general see Estate and other proper titles. And see Vaugh. 187. to 205. Holden v. Smallbrooke.]

## Occupier.

### (A) *Who* ; and capable of what.

1. *Prescription* was laid in all the occupiers of such a close, that they time out mind had *repaired a fence*. This is too general and ill ; for every tenant † at will, or at sufferance, or a disseisor are occupiers, and they \* cannot charge the land ; but such a prescription to pay so much *in discharge of tythes* by the occupiers has been allowed good ; for it is for the benefit of the land ; and tythes arise on the occupying of the land. Cro. E. 445. Mich. 37 & 38 Eliz. C. B. Austy als. Ausby v. Fawcner. 10 Mod. 301. Arg. says, that this Case was denied to be law. Mich. 9 Ann. in Case of Thorn v. Rookby.—S. P. 5 Rep. 99. b. Hill. 40 Eliz. C. B. Rooke's Case.—S. P. 2 Roll. R. 289. Hill. 20 Jac. in Case of Holbert v. Warner.—\* 2 Lev. 164. Welby v. Herbert.—6 Rep. 60. Gateward's Case.

2. He who *takes any thing as a profit apprender* is not tenant, nor occupier, and cannot prescribe to be discharged of tythes under those denominations. 2 Bulf. 249. Trin. 12 Jac. B. R. Suckerman and Coates v. Warner.

3. *Where there is no tenant*, the owner may be understood to be the occupier. As if he grants a house in his occupation, tho' he does not inhabit it himself, yet if it be not inhabited by another, it is well enough. Vent. 312. in a Case of Chimney Money. Trin. 29 Car. 2. B. R. The Company of Ironmongers v. Nailor.

[For more of *Occupier* in general see *Chimney*, *Robbery*, and other proper titles.]

## Offer.

### (A) Offer. In what Cases a Man shall be bound by his Offer.

1. A Defendant was held to the offer in his answer in Chancery, tho' the circumstances of the case were varied from what they were at the time when the answer was put in. Vern. [ 77 ] 448. Pasch. 1687. Holford v. Burpell.

2. Where

2. Where the defendant pleaded himself a *purchasor for a valuable consideration without notice, as by the deed &c. ready to be produced may appear*; and upon arguing the plea, it was ordered to stand for an answer; and it being moved that the defendant might leave the deed with his clerk in Court, that the plaintiff might have the sight and perusal of it pursuant to the offer in his answer; and tho' the Bar (being asked by the Court how the course was) agreed, that by his offer the defendant had *made the deed part of his answer*, and therefore it had been the course to order it to be produc'd; yet my Ld. Chancellor said, he would not bind the defendant, being a purchasor, by the *improvident offer* in his answer. Abr. Equity Cases 36. pl. 3. Mich. 1698. Watkins v. Hatchet.

3. *Plaintiff tenant in tail* endeavouring by his bill to set aside a jointure made by his father by virtue of a *power ill executed*, but offering to settle 100 l. on the jointress, was held to his offer in his bill, and decreed accordingly. G. Equ. R. 9. Trin. 7 Annæ. Mapletoft v. Mapletoft and Clerk.

The Master of the Rolls. Mich. 1718. cited Lord Cowper, as

having often said that a man should not be bound by an offer made during a treaty, which afterwards broke off, or upon terms that were not accepted. Wms's Rep. 497. in Case of Turton v. Benson.

4. An offer to deliver up a bond on terms not comply'd with is not binding, and if made without consideration is *nudum pactum*. 2 Vern. 717. Mich. 1716. Harman v. Vanhatton.

## (B) Where after an Offer refused, no Relief will be given in Equity.

1. **A.** Recovers judgment against B. and has a lease sold to him by the sheriff. C. the ground-landlord enters, and having judgment in ejectment for non-payment of the ground rent, offers A. on payment of arrears and costs at law, to make him a new lease for the remainder of the term. A. refusing this, C. lets it to another. A. brings his bill to be relieved against the *recovery and forfeiture at law*, having first tendered the arrears and costs. The bill dismissed with costs. Vern. 449. Pasch. 1687. Derrington v. Jackson and Wat-son.

[For more of Offer see Marriage, Tender, and other proper titles.]

(A) Offer-

## (A) Offerings.

1. **O**blations and offerings seem to be but one and the same thing, and are in a sense something of the nature of tithes being offered to God and his church, of things real or personal. Offerings are *reckoned amongst personal tithes*, and as such come by labour and industry; are paid by servants and others once a year to the parson or vicar, according to the custom of the place; or they are to be paid in the place where the party dwells, at such four offering-days, as before the statute 2 & 3 Ed. 6. c. 13. within the space of four years then last past had been used for the payment thereof, and in default thereof.

\* Cro. 3. Abridg. Cases 159. in London offerings are a groat a house. They are by the law now in force, to be paid as formerly they have been. See Stat. 32 H. 8. 7. 27 H. 8. 20. 2 & 3 Ed. 6. 13. and Co. 11. 16. They properly *belong to the parson or vicar of that church where they are made*; of these some were *free and voluntary*, others by custom certain and obligatory. They were *anciently due to the parson of the parish that officiated at the mother church, or chapels that had parochial rights*, but if they were paid to other chapels that had not any parochial rights, the chaplains thereof were accountable for the same to the parson of the mother-church. Lindw. c. de Oblation. & cap. quia quidam. Such offerings as at this day are due to the parson or vicar at sacraments, marriages, burials, or churching of women, are only such as were confirmed by the statute of 2 Ed. 6. 13. and payable by the laws and customs of this realm, before the making of the said statute, and are recoverable only in the Ecclesiastical Court. Godolph. Rep. 426, 427.

perly belong to the parson or vicar of the church where they are made, and are recoverable by law in such places and cases only where there is a custom for payment of certain sums upon the performance of these several duties. Wats. Comp. Inc. 1033. cap. 52. — \* Cro. C. 596. Mich. 16 Car. 2. B. R. Anon, ———† 2 Inst. 659.

2. *Trespass of monies taken, the plaintiff cannot count of offerings*; for it may be, that if offerings had been in the writ, the defendant as parson there might have *pleaded to the jurisdiction*. Br. Count, pl. 90. cites 34 E. 3. 23.

3. *Account* lies not for offerings against the parish priest, if there be no agreement about them; for the clerk holds the vessel in which they are put. F. N. B. 119. (E).

4. *Coat, armor, penons, and sword*, put up in a chapel where a person is buried, nor the carpet, livery, and cushion which are

are in a place in the chancel where the deceased used to sit, cannot be claimed by the parson as oblations. Godolph. Rep. 155. cap. 12. f. 38. cites 9 H. 4. 14. Dame Wick's Case.

21 Rep. 16. 5. Offerings and obventions are in London the profits of the church, and not in corn or other manner. 2 Inst. 659.  
 a. Arg. cites 30 E. 3. 1.  
 a. and 38 E. 3. 13. a. per Finchden. S. P. and Ibid. 16. b. it was said, as to the said opinions in 30 E. 3. & 38 E. 3. that obventio dicitur ab obveniēdo, and includes oblations, rents, and other revenues, which may well agree with the resolution there, viz. in Dr. Grant's Case.——Wats. Comp. Inc. 890. cap. 146. cites S. C.

6. A writ of *right of advowson* was brought of the 4th part of the tithes and offerings of the church of St. Dunstan in the West in Fleet-street London, and adjudged good. 2 Inst. 659.

7. 32 H. 8. cap. 7. f. 2. *Enforces the payment of offerings according to the custom of places where they grow due.*

8. 2 & 3 E. 6. cap. 13. f. 10. *All persons which by the laws of this realm ought to pay their offerings, shall yearly pay to the parson, vicar, proprietary, or their deputies, or farmers of the parishes where they dwell at such 4 offering-days, as heretofore within the space of 4 years last past hath been accustomed, and in default thereof shall pay for their said offerings at Easter following.*

9. By a lease de rectoria, the lessee shall have the tithes and offerings of the same church; for they are incident to it. Fin. Law. 80. 88.

10. Oblations were paid for houses in all places, and now by the statute are brought to a certainty, that is, a groat for a house. Hob. 11. in Case of Leyfield v. Tisdale.

[ 79 ] 11. The suggestion for a prohibition was a *modus for a farm*, and the libel was for tithes and offerings, by which it was mov'd, that the suggestion does not extend to the offerings; wherefore it was ruled per Cur. that a prohibition shall be only *quoad*. Sid. 251. Pasch. 17 Car. B. R. Lush v. Webb.——And says it was so rul'd upon a motion the other Term, in the Case of Coleman and Gilbert.

[For more of Offerings in general, see *Dissines*, or *Tithes*, and other proper titles.]

## Office or Inquisition.

(A) The *Original* of it.

1. THE office was devised by law for an authentical means to bring the King to the land by solemn matter of record suitable to his regality, and for the safety of the subject, that he should not enter or seize the lands of the subject upon surmises without matter of record. Hob. 347. 13 Jac. in Scacc. in Case of Sheffield v. Ratcliffe.

(B) The *several Sorts* of Offices.

1. THERE are two sorts of offices, the one which vests the estate and possession of land &c. in the King where he had only right or title before, and this is called office of *intituling*; as in case of a purchase by alien or villein of the King, or by any body corporate or politick in mortmain, or by a person attainted of felony &c. and such office which concerns fee or franktenement, ought to be by force of a commission under the great seal of England. There is another office, and this is called the office of \* *instruction*, and this is when the estate of the land &c. is lawfully in the King before, but the particularity of the land &c. does not appear of record, so that it may be put in charge; as if one be attainted of high treason, all his lands &c. are immediately by the statute of 33 H. 8. cap. 20. in the King; or if tenant of the King commits felony, is attainted and dres, in these and other such cases the estate of the land is in the King without any office. But if it does not appear to the Court of Exchequer, of what lands the person attainted was seized at the time of his attainder or after, and if it be found by office by force of a commission under the Exchequer seal, this is a sufficient record to instruct the King of the certainty of the land, by which it may be put in charge. 5 Rep. 52. a. b. Mich. 29 & 30 Eliz. in the Exchequer, in Page's Case.

10 Rep.  
115. a.—  
S. P. Godb.  
312. Pasch.  
21 Jac. cite  
S. C. in  
Case of  
Sheffield v.  
Ratcliffe.—  
\* S. P. and  
the office of  
instruction  
shall relate  
to the time  
of the at-  
tainer not  
to make the  
King in by  
descent, but  
to avoid all  
misre-  
cumbrances.  
Arg. Godb.  
312. Pasch.  
21 Jac. in  
Case of  
Sheffield v.  
Ratcliffe  
The of-  
fice of inti-

ing was always by inquisition found by commission under the broad seal; for the King could not take but by matter of record, no more than he could give without matter of record; and this was a part of the liberty of England, that the King's officers might not enter upon any other man's possession till the jury had found the King's title; therefore where the King's title appeared of record, his officers might enter without any office found: as where the lands are held of the Crown, and the tenant dies without heir, the officers of the King may enter, because the tenure is upon record whereby the King's title appears; so by the common law, where the land belonged to nobody, the King's officers might enter, because by the law the land is in the Crown; for the law makes the King where the property is in no man; but if any body else is in possession, the lands cannot

cannot be devised without matter of record; and where the King is intitled by matter of record, there is no need of any office to intitle him. The offices of *instruction* settled the annual value of the lands, and by that value the escheator accounted, unless the Court, by putting it up to auction, found any person that would give more for the land, and then they let it by lease under the Exchequer seal. Gilb. Hist. View of the Exchequer, 132, 133, 134.

[ 80 ]

See (D)—  
See Prerog.  
(H. b)  
S. P. and  
therefore  
need not be  
traversed.

## (C) How the Finding must be.

1. **I** F office be found *before the steward which ought to be before the escheator*, this is void, & coram non iudice. Br. Office devant &c. pl. 54. (bis) cites 24 E. 3. 35.  
Br. Traverse de Office, pl. 44. cites S. C.

2. It was found *before the escheator ex officio, that J. S. had done treason*, and was seized of certain lands &c. and the King seized and granted them to one A. by which B. tenant brought scire facias against A. to repeal those patents; and because the party was not indicted of treason, the office was not regarded, but proceeding granted to B. Br. Office devant &c. pl. 51. cites 8 H. 4. 21, 22.

3. If 2 contrary offices are found, and the one finds the heir within age, and the other finds him of full age; that which makes best for the King shall be received. Arg. Hard. 14. cites 14 E. 4, 5. b. 5 E. 4. 4. a.

4 Where the last office is contrary to the first, it seems to be void; and contra, where the last office stands with the first office, as one [parcel of] land in the one office, and other land in the other office. Br. Livery, pl. 35. cites 9 H. 7. 9.

5. In assise, *pluries ought to issue out of Chancery, and not out of the Exchequer*: and per Cur. office found *virtute officii* is as well to intitle the King, as office *virtute brevis*; but the heir shall not have livery upon office *virtute officii*. Br. Office devant &c. pl. 61. cites 16 H. 7. 11.

6. If office finds the death of the King's tenant, and that his heir is of full age, and does not say when, there it shall be intended that he was of full age at the time of the caption of the inquisition, but that he was within age at the time of the death of the tenant; and therefore ought to be express'd certainly, that he was of full age. Br. Office devant &c. pl. 58. cites 29 H. 8.

7. A double ignoramus (on inquest first, and after on a melius inquirendum) of *de quo vel de quibus tenentur* &c. ignorant &c. was resolved to be sufficient to intitle the King. Cro. J. 40. Mich. 2 Jac. in the Court of Wards. House's Case.

8. Inquisition finding some parts well, and nothing as to others, may be supplied by *melius inquirendum*; otherwise if defective in the points found. 2 Salk. 469. Mich. 2 W. & M. B. R. Layton v. Manlove.

(D) Necessary.

## (D) Necessary. In what Cases.

1. **I**N quare impedit the King made title to present, because the *advowson* was held of him in chief; and was alien'd without licence, by which he presented &c. and admitted for good title; and yet it is not alledged that the alienation was found by office; quod nota. And therefore it seems that the King may have *chattle* without office. Br. Prerogative, pl. 33. cites 2 E. 3. 71.

*use without licence*, that the seisin of this is not in the King without office thereof found. Br. Office devant &c. pl. 3. cites 9 H. 6. 22.

It was in a manner agreed, that where a man alien a manor and advowson to a prior in free to hold to his proper

2. The *escheator* may \* *seize the ward* for the King without office; per Thorp: quod non negatur; and therefore it seems that *chattel may vest in the King without office*, but he cannot grant the land before office, by the statute of 18 H. 6. Br. Prerogative, pl. 30. cites 24 E. 3. 54.

Br. Office devant &c. pl. 30. cites [ 81 ] S. C. —

\* And information that

such a one has seized the ward of the King, is sufficient for the King to seize the ward without office. Br. Prerogative, pl. 121. cites 1 E. 5. 7. per Catesby J. — And if it be found by office, he may enter into the land; per Mordaunt, which Frowike affirmed. Br. Office devant &c. pl. 36. cites 12 H. 7. 20. — But he is not intitled to the land of his ward without office, tho' he has nothing in it but a chattle. Br. Office devant &c. pl. 55. cites it as agreed by the Justices, 5 E. 6. in the Case of Charles Brandon Duke of Suffolk.

3. If a *villain of the King purchases goods*, the King shall be adjudged in possession of them without office found; but if he purchases land, the King ought to seize before that he shall be possessed: quære, if this ought not to be found by office. Br. Office devant &c. pl. 53. cites 35 E. 3. and Fitzh. Villeinage 22.

Br. Property, pl. 43. cites S. C. Brooke says the reason seems to be inasmuch as

goods are moveable and transitory; and it is said elsewhere, that the King may grant the ward of the body without office. — Br. Prerogative, pl. 113. cites S. C. And Brooke says it seems to him that the seizing of the land shall be by office; for land abides, but oxen or cows may be eaten or wasted.

4. The King is not in possession by alienation of his tenant, who holds of him in capite without licence, till the tenure and the alienation are found by office. Br. Office devant &c. pl. 24. cites 50 Aff. 2.

Br. Traverse de Off. pl. 22. cites S. C.

5. It seems that if the King has not office, which proves him to have a title, then he shall not be seized of the land of any; nor can he by this entry or by any other act without matter of record be seized of the land of any other, unless where the writ issues to the escheator to seize; for there may be seisin without office, as it seems there. Br. Patents, pl. 3. cites 9 H. 6. 20.

6. Where a man is attainted, the King cannot enter without office. Br. Traverse de Office, pl. 32. cites 4 E. 4. 21.

Br. Office devant. pl. 38. cites

4 E. 22. 23. S. C. — S. P. upon attainder of felony, 1 Rep. 50. Trin. 42 Elis. in Alston Wood's Case. — 5 Rep. 52. b.

7. In quare impedit the King counted by title of attainder of treason

• Queen Elizabeth having lands by forfeiture for treason, whereof A. had been seised in fee, M. his wife, by petition of right, which comprehended the title of

• *treason* to have presentation without office found: and it was held by the Justices that the King may be intitled to the *presentation fallen without office*; for that is only a chattle, but the inheritance of *advowson* is real. And so of things transitory, the King shall have them without office, as the word of a body, and may grant it without office. And so where a man outlaw'd has an *advowson*, and after the church voids, the King shall have it without office. Br. Office devant &c. pl. 45. cites 20 Ed. 4. 11.

8. And therefore the same law seems to be of goods moveable. Ibid.

M. and of the Queen, claimed her *dower*, which in effect was this, that A. her husband was seised thereof in fee, and took her to wife, and before his treason committed levied a fine with proclamation to another, whose estate the Queen had by lawful conveyance therein express'd; and that afterwards A. was attainted of high treason by outlawry, and died, which outlawry was afterwards reversed in a writ of error. And it was resolved by the Lord Chancellor, with the advice of all the Judges, that the petitioner need not have any office to find her title, because her title stands with the title of the Queen, and the Queen is not intitled by office (which she might traverse, contest or avoid), but by conveyance, which she affirmeth. 3 Inst. 215, 216. cites Hill. 27 Eliz.

The lands, whereof a person attainted of high treason dies seised of an estate in fee, are actually vested in the King without any office, because they cannot descend, the blood being corrupted, and the freehold shall not be in abeyance; but it seems agreed, that by the common law such lands were not vested in the actual possession of the King during the life of the offender without an office. 2 Hawk. Pl. C. 248. cap. 49. f. 1. 2.

A right of entry into lands, to which a person attainted of high treason is intitled, is as much forfeited as lands in possession; but the King shall not be adjudged in possession of such lands without an office, and scire facias or seisure on such office; for the words that the King shall be deemed in possession without office &c. in the statute 33 H. 8. shall have this construction, that he shall be in possession without office in the same manner as he should have been upon an office found at common law. But at the common law, if a disseisee had been attainted of high treason, and the seisin found by office, the King should not have been in possession without a scire facias, or a seisure at least. 2 Hawk. Pl. C. 452. cap. 49. f. 23.

[ 82 ] 9. If the King leases for years, rendering rent with clause of re-entry, the King cannot enter for non-payment till the matter be found by office. Br. Office devant &c. pl. 30. cites 2 H. 7. 8.

57. cites 2 H. 7. 8. And per Brian, the King need not demand the rent as a common person shall do: but per Hussey, the King is not in possession thereof till the condition broken be found by office.

The King grants a lease, proviso that the lease shall be void on non-payment. The rent is arrear. The lease is void without any office; and yet office is necessary to intitle the King to the *mesne profits* and the possession, by reason that the non-payment of the rent is matter of fact in Pais, and is not triable by record; but if the condition had been triable by record, there by the breach of the condition the King should be in possession without office; as, upon condition to grant other land by deed inrolled in Chancery, or to surrender parcel in the Exchequer by such a day, if the tenant fails, office is not necessary to intitle the King to the possession, because the records of the Chancery and Exchequer themselves prove title sufficient. Per Manwood Ch. B. and judgment accordingly, which was affirmed in error. Mo. 291, 295, 296. Pasch. 32 Eliz. Sir Moile Finch. v. Throckmorton.

If the King grants a lease for life, on condition to be void on non-payment of the rent in forty days, he can't be intitled thereto on breach, unless by office found in its proper county to avoid it. But such condition reserv'd on lease for years, may be found by office in another county, and 'tis but an office to inform the King, which in whatsoever county found is sufficient. Cro. E. 855. Trin. 43 & 44 Eliz. Br. Parlow v. Corne.—The lessee continuing possession than't be accounted an intruder before office thereof found, but he shall be accountant for the profits to the King as bailiff of his own tort. 2 Le. 134. Sir Moile Finch's Case.—2 Le. 206. S. C. cited.

Br. Office devant &c. pl. 34. cites 2 C.

10. The King may be seised without office. Br. Prerogative, pl. 91. cites 9 H. 7. 2. per Oxenbridge.

11. *As where the King's \* tenant dies without heir.* Ibid. S. P. and Brooke favr.  
it seems that entry by a stranger shall not alter the case; for if the King be seised by law without office, a stranger by his entry cannot devise the franktenement out of the King. Br. Office devant &c. pl. 34. cites S. C.

\* S. P. That the franktenement is in the King without office or entry where no stranger enters; for franktenement cannot merge; quod nota. Br. Escheat, pl. 33. cites S. C.—Br. Escheat, pl. 25. cites S. C.

12. *So if he be attainted of treason and dies; for he cannot have heir.* Ibid. Br. Office devant &c. pl. 34. cites S. C.—Br. Office devant &c. pl. 38. cites 4 E. 4. 22. 23. Contra, that where a man is attainted of treason, yet the King cannot enter without office.—But see pl. 7. and the notes there.

13. *So if tenant in tail, the reversion to the King dies without issue.* Ibid. Fr. Office devant &c. pl. 24. cites S. C.—If tenant in tail, or for term of life [of the grant] of the King dies without issue, franktenement is in the King; and where the father dies and none enter, the franktenement is in the son, and so in the King, if the King be heir to such person who dies seised. Br. Escheat, pl. 33. cites S. C.

14. *So of tenant for life, the reversion to the King, and the tenant dies, the King is seised in fact without office; per Oxenbridge.* And per Hufsey this may be law; but per Fisher it is good law; for franktenement cannot be in suspense; contra upon alienation \* in mortmain. Br. Prerogative, pl. 91. cites 9 H. 7. 2. Br. Office devant, pl. 34. cites S. C.—  
\* S. P. and so of alienation by tenant of the King without licence. Ibid.—And if tenant for life, the reversion to the King, surrenders by deed inrolled, the franktenement is in the King without other record; for this is matter of record by the inrollment; per Hufsey, and of the others he would be advised. Br. Prerogative, pl. 91. cites 9 H. 7. 2.

15. It is not necessary that an office be found to intitle the King where the law casts the possession upon him; as in case of escheat and limitation of a remainder to the King, which afterwards vests in possession &c. but otherwise where the law casts the possession and franktenement on the heir, as in case of ward. Pl. C. 229. b. 230. Willion v. Barkley.—cites T. 9 H. 7. 2. Br. Escheat. 25. 33. Office devant 34. Prærogative 91.

16. The King in some cases may be in possession without office, and none can dispossess him; as where war is between England and France, the possession of priors aliens may be seised by command without office: and so of temporalities of a bishop upon contempt; for those possessions are apparent and known in certain. Br. Office devant &c. pl. 14. cites 21 H. 7. 7. per Frowick Ch. J. for clear law. Br. Prerogative, pl. 38. cites S. C. And if term for years be outlawed, there the King shall seise without office.

And so see that in cases of chattles the King may seise and have possession without office. Ibid.—And by Mordant and Frowike where a common person cannot enter, but is put to an action, as for waste, cesses by cessavit, or the like, if such matter be found for the King by office, he cannot enter, but shall have seire facias. Br. Office devant &c. pl. 26. cites 12 H. 7. 20. [21.]

17. The King never shall be entitled by matter in fact, nor by allegation of matter in fact, but by matter of record; per Rede clearly. Br. Office devant &c. pl. 15. cites 21 H. 7. 19. And Brooke says, that by this it seems that information in the Exchequer does not intitle the King till it be found between the parties by issue tried, or by confession.

confession of record. Ibid. — *Quære if tail is discontinued by the ancestor of the King who was a subject, or the possession of a feme be discontinued, and after it is found that the King is heir to the tail, or to the feme by office, whether the King be not put to a scire facias in this case? It seems that he is.* Ibid.

\* See the Stat. 18 H. 6. 6. at Pre-rogative (H. b.).

\* S. P. 2 Le. 206. Arg. — S. P. Lane 37 Arg. cites 21 H. 7. 8. — S. P. Ibid. 63. per Tanfield Ch. B.

Trin. 7 Jac. in the Exchequer, in Sir Edward Dimock's Case.

A. the father of B. the plaintiff being possessed of a lease for years, was outlawed for high treason; an inquisition found B.'s title, and the tenements were seized into the King's hands, who granted away the term; the outlawry was afterwards reversed for error; and thereupon the lease was restored to B. 2 Vern. 312. Hill. 1693. Peyton v. Ayliffe. — [Quære if the inquisition was necessary].

18. If the King grants land for life and after the patentee dies, yet the King cannot grant it over till the death be found by office, and this by the statute of \* 18 H. 6. Br. Office devant &c. pl. 56. cites 29 H. 8.

19. The Queen cannot be intituled to things real without office. But for things personal she may in several cases. So for chattels real; as in outlawry, the Queen shall have obligations — statutes — recognizances — leases for years — next avoidances without office — because the Queen is intituled by the record of the outlawry; per Clark J. Mo. 292. Pasch. 32 Eliz. in the Case of Sir M. Finch v. Throgmorton.

20. There is a difference between an act of assurance and an act of forfeiture. If the words are, that the King shall have and enjoy, 'tis then an act of assurance, and the lands are given to the King without office; but by an act of forfeiture, the lands are not in the King without office found. Arg. Godb. 304. Pasch. 21 Jac. in Case of Sheffield v. Radcliffe.

2 Vent. 270. S. C. adjudged, and Pollexfen Ch. J. conceived it in nature of a chose en action.

21. An archdeacon made sale of the office of register of his archdeaconry, by means of which it became forfeited by the statute of 5 & 6 E. 6. cap. 16. And the question was, whether the King having granted the same without any office found thereof it be good? And resolv'd that it is good; because no estate or interest in the office is forfeited, either of the archdeacon or register, nor is any franktenement to be divested out of him, and vested in the King; but the office is become void, and by the disability of the archdeacon, the power to supply the office of register is in the King, and cited 20 E. 4. 11. a. and therefore gave judgment unanimously for the plaintiff. 3 Lev. 289. Hill. 2 W. & M. C. B. Woodward v. Fox.

Agreed, that as to such vacancy the right to supply that was a chattle separate from the inheritance, and the King might supply such present avoidance before any office found, tho' it be admitted that the right of nomination in point of estate, should not vest in the King before office found. 2 Vent. 270. Woodward v. Fox.

22. Where a freehold is forfeited to the King by any statute, it is requisite that an office should be found of the forfeiture. But where it is only a power to appoint an officer 'tis otherwise. 2 Vent. 267. Hill. 2 & 3 W. & M. C. B. Woodward v. Fox.

But where a sci. fa. is brought for the forfeiture of a pa-

23. In a scire facias out of Chancery to repeal a patent for a mark, it was objected that an office ought to have been found before the scire facias. For that a sci. fa. is a judicial writ, and ought to be founded upon a record. But it was resolved, that it

it is true that a *sci. facias* ought to be founded upon a record, and that so it is in this case; for the patent is a \* record in Chancery, out of which Court the *sci. fa.* issued, and it is a sufficient record whereon to found it. 3 Lev. 223. Trin. 1 Jac. 2. in the House of Lords on appeal from the Chancery. The King v. Butler.

*Sci. fa.* unless the forfeiture appear on record in the same Court, upon which to found the *sci. fa.* And where the office is found, the King seises immediately upon the office; but where the *sci. fa.* is founded upon the patent, as in the principal case, the King cannot *seise* till the forfeiture or other defect of the patent be try'd upon the *sci. fa.* 3 Lev. 223. Trip. 1 Jac. 2. in the House of Lords on appeal out of Chancery. The King v. Butler,

24. The King granted the wardship of body and lands, *rendering rent to the receiver or his deputy within 40 days after the feasts appointed for payment*, with a clause to be void on nonpayment. It was agreed, that the lease is not absolutely void by nonpayment of the rent reserved, unless office be found; because it was payable to the receiver or his deputy, which is *matter of fact in Pais*. For there is a difference between a lease for years, reserving rent payable at the receipt of the Exchequer, with such proviso, and when it is payable to the receiver or his deputy; for in the first case the payment or nonpayment appears of record; and therefore there needs no office to prove the nonpayment; but in the last case it does not appear of record, and therefore in that case the lease is not void by nonpayment without office. Cro. C. 99, 100. Mich. 3 Car. Stephens v. Potter.

2 Le. 134 to 146. pl. 178. in the Exchequer, S. C. — S. P. Poph. 53. Trin. 36 Eliz. cites S. C. and judgment there given accordingly, FINCH v. RISELEY. And that where in the case of a common person, an entry is necessary to defeat an estate, there in the King's Case an office is necessary to determine the estate; for an office in the King's Case countervails an entry; because the King in person cannot make an entry.

### (E) Necessary. *What the King may do before Office found.*

1. **WHERE** it is awarded that the temporalities of a bishop shall be seised into the hands of the King, the King shall take conuifance of them, and shall present to the advowson; for the temporalities of a bishop are always of record in the Exchequer, as appears 21 H. 7. 7. Br. Office devant &c. pl. 17. cites 21 E. 3. 30. and Fitzh. Scire Fa. 113.

2. Where the King's tenant dies seised of an advowson, or in case of an outlawry, tho' the estate is not in the King before office, yet if the church becomes void, the King shall present before office. 2 Vent. 270. in Case of Woodward v. Fox. — cites 20 E. 4. 11.

3. Where the King leases for years with clause of re-entry for nonpayment of the rent, the King need not demand the rent before he re-enters; but it is said there, that if the King grants the rent and re-entry to another, he cannot enter without demanding the rent, and the King may grant his action, and a chose en

S. P. 9 Rep. 95. b. in Sir George Reynold's Case,

Kelw. 42. b. 43. — 9 Rep. 95. b. 96. in Sir G. Reynold's Case,

S. P. Mo. 296. Pasch. 32 Eliz. Sir Moile Finch v. Throckmorton,

action, contrary of a common person; quod nota; per Hufsey and Brian, and the King cannot enter till the nonpayment be found by office. Br. Entre Cong. pl. 88. cites 2 H. 7. 8.

4. Brooke makes a quære, if grant of the King be good without office, in case of alienation in mortmain, or by tenant of the King without licence, by reason of the statute 18 H. 6. 6. that grants before office shall be void. Br. Office devant &c. pl. 34. cites 9 H. 7. 2.

5. Note, by those of the Exchequer, where a man is *attainted by parliament, and all his lands to be forfeited, and does not say that they shall be in the King without office*, there they are not in seisin of the King to grant over without office; for it does not appear of record what lands they are. Br. Office devant &c. pl. 17, cites 27 H. 8.

[ 85 ] 6. In some cases the King shall be in possession *by office without seisure*, as of lands, tenements, offices &c. which are local, or whereof continual profit may be taken; as where 'tis found by office that condition is broken, or that person attaint of felony is seised of land &c. or in case of ward of land &c.—In some case the King shall be in possession *by office and seisure*, as in case of advowson &c. the right patron shall not be ousted by such false office found of it, till the King presents, and his clerk admitted and instituted. 9 Rep. 95. b. Hill. 9 Jac. in Canc. in Sir George Reynolds's Case.

7. In case of a *transitory chattel* coming to the King an office is not necessary; but where an *interest* comes to the King an office ought to be found. Arg. Lane. 43. Pasch. 7 Jac. in Case of the King v. the Earl of Nottingham & al.

8. In case of *Simony* the King shall present without office. 2 Vent. 270. Hill. 2 & 3 W & M. C. B. in Case of Woodward v. Fox.

9. A promise and order was made for passing a patent for the office of warden of the Fleet to L. on a supposed forfeiture for permitting escapes, and this was insisted to be before inquisition taken, or forfeiture found, and therefore illegal; to which it was answered, that in truth the inquisition bears date, and was taken before the warrant for passing the patent, though not filed till afterwards, and that that is not material; for this is none of the cases where the statute requires the filing of an inquisition, and only in cases of grants of lands and tenements; but the Court held it to be a matter of great consequence to the King, and to the subject if the seal should be put to this patent, and that it might occasion a general escape of all the prisoners in the Fleet, and therefore would know the King's pleasure before they would pass the grant. 2 Vern. 173. Trin. 1690. Colonel Leighton's Case.

## (F) In what Cases the Office shall be sufficient without Seizure.

1. IF office be found for the King of an *advowson in gross*, yet by this the owner is not out of possession. Br. Office devant &c. pl. 52. cites 17 E. 3. 10.

Upon office found that the tenant in his life granted the

next presentation to B. who presented C. who was insufficient, and did not present another within six months, by which the defendant the ordinary made collation by lapse, and that the King was intitled by the heir within age and in his ward; there the King is not in possession, but shall have *quare impedit*; for he is not in possession of the *advowson*. Br. Office devant, pl. 11. cites 14 H. 7. 22. and 15 H. 7. 6.—Br. Traverse de Office, pl. 15. cites S. C.

2. The King may be in possession of an *advowson appendant or in gross*, by office thereof found; contra of *common or rent*; for *præcipe lies* of *advowson*, and livery may be made of it; contra of rent and common. Br. Office devant &c. pl. 46. cites 20 E. 4. 13, 14. and 21 E. 4. 1.

And of office found of lands and tenements which are manual or lie in occupation, the

King by this is in possession without entry, and others by this are out of possession; contra of *rent and common*, as appears there; and a man may be out of possession of *advowson* by presentment; contra of rent and common. Ibid.—Br. Traverse de Office, pl. 40. cites S. C.

3. There are some offices which do not put the King in possession, as where *wast* is found by tenant of the King, he shall have *scire facias* upon the office; per Coninge. Br. Office devant, pl. 11. cites 14 H. 7. 22. and 15 H. 7. 6.

Br. Traverse de Office, pl. 15. cites S. C.—S. P. per Rede J.

which Tremaille J. agreed. Br. Office devant &c. pl. 15. cites 21 H. 7. 19.—But where office finds matter for the King, by which a common person may enter, in such case the King shall be adjudged in possession; per Rede J. Br. Office devant &c. pl. 15. cites 21 H. 7. 19.

4. So upon *cessavit* found by office, he shall have writ of *scire facias*. Ibid. [ 86 ]

Br. Traverse de Office,

pl. 15. cites S. C.—S. P. per Rede J. which Tremaille J. agreed. Br. Office devant, pl. 15. cites 21 H. 7. 19.

## (F. 2) In what Cases the Office shall be sufficient to put the Party out of Possession.

1. QUARE impedit by the King, and counted that it was found by office, that S. B. held the manor of W. to which the *advowson* is appendant of him by knights service, as of the earldom of B. which came to him by attainder, and that S. B. presented &c. and after died his heir within age, and now in ward of the King, and the Church voided, and the King presented, and the defendant disturbed him; the defendant said, that A. was seized of the *advowson* in fee, and presented him, *absque hoc*, that the said S. B. presented modo & forma; per Jenny, office which intitles the King to lands or tenements puts him in possession, and all others are by this put out of possession, and therefore such office shall be traversed

But if it be found that the tenant of the King has common in my land appendant, this shall not be traversed in Chancery, but by plea; for by this the party is not out of

possession. Br. Tra-  
 verse de Office, pl. 40. cites 20 E. 4. 14. and 21 E. 4. 1.  
 Ibid.—So where it is found that the tenant of the King died seised of a manor to which a villein is regardant, the villein may traverse it by plea, and not in Chancery. Ibid.—So of a rent-charge, as where it is found that the tenant of the King has a rent-charge out of my manor, I shall avoid it by way of answer; and Choke and Nottingham Ch. Baron agreed with Jenney. Ibid.—But per Brian Ch. J. there is a diversity where a thing is found expressly by office, and where imply'd as here by these words, cum pertinentiis, which is imply'd, there this need not be traversed in Chancery, but by way of answer. Ibid.—And by him if it had been expressly found of the advowson in the office; yet because it does not lie in manual occupation, it need not be traversed in Chancery, but by way of plea; but Billing Ch. J. of England agreed, that the office ought to be traversed. Ibid.—And per Collow, the appendancy is the title of the King; for he is intitled to by office, and therefore this ought to be traversed, and not the presentment, which Littleton and Brian J. agreed. Ibid.—Br. Traverse per sauns &c. pl. 257. cites 20 E. 4. 13, 14. and 21 E. 4. 1. 3. S. C.—Br. Office devant, pl. 46. cites S. C.

### (G) Subject bound by it. In what Cases.

Br. Entre  
 Cong. pl. 27.  
 cites S. C.

1. OFFICE is found for the King, and after upon false surmise other office is found for a party, this shall not discharge the office found for the King; but if he enters it is intrusion; for it is only inquest of office, which shall not discharge the title of the King; and also inquest of office found for a subject shall not bind any party; quod nota; for it is only evidence; but inquest of office found for the King shall bind till it be traversed; note a diversity. Br. Enquest, pl. 22. cites 21 E. 3. 1, 2.

\* S. P. Br.  
 Office devant  
 &c. pl. 40.  
 cites 5 E. 4.  
 3. 4. But  
 Brook says,  
 see now the  
 statute of  
 2 E. 6. 8.  
 thereof.

2. Office found that J. S. tenant of the King died seised, and that W. S. is his son and heir, and of the \* age of one year, where he is of the age of 40 years, he has no remedy at the common law, and shall not have livery till 20 years after; and per Brian, if it be found that J. S. holds of the King in capite, his heir within age, where in fact he has no land, his heir shall be in ward, and has no remedy; but per Towns. he has; for he may traverse, quod Catesby, Neal, and Hussey, concesserunt. Br. Office devant &c. pl. 28. cites 1 H. 7. 3.

Br. Tra-  
 verse de Of-  
 fice, pl. 47.  
 cites S. C.

3. And if it be found that the King's tenant died seised; and that I am his heir, and of the age of five years, and it is found by another office that another is heir and of full age, I shall have no remedy before that I am of full age, and then to interplead; and none shall interplead but he who has office found for him. Br. Office devant &c. pl. 40. cites 5 E. 4. 3, 4.

[ 87 ]

4. In annuity, if the King be intitled by office to land to which N. has title and right, he cannot enter upon the King; for by the office the King is in possession, and N. is out of possession, and if the King grants it over, he cannot enter upon the patentee, the office being in force; but he who has a rent-charge or common out of that land is not out of possession, but may distrain the patentee, or use his common. Br. Entre Cong. pl. 42. cites 21 H. 7. 1.

This being  
 a beneficial  
 law the ef-  
 fates of te-  
 nant by sta-  
 tute staple,  
 merchant

5. 2 & 3 Ed. 6. cap. 8. s. 3. enacts, That where any office or inquisition is found omitting any title for term of years, by copy of court-roll or other interest, every lessee or copyholder, and every person that shall have any interest to any rent, common, or profit appender, out of any lands contained in such office or inquisition, shall enjoy their

*their leases and interests, rents &c. as they might have done, in case there had been none such office or inquisition found, and as they ought to have done in case such lease, interest by copy of court-roll, rent &c. had been found in such office or inquisition.*

and elegit, and executors, that hold lands for payment of debts are

taken to be within the benefit of this clause. Co. Litt. 77. b. — S. P. because their interest is but a chattle real. 2 Inst. 689.

Termors before this statute had not any traverse, and the statute does not give any traverse to them; then what means shall the defendant have to save his term? Only by the supplying the defect of the inquisition, and shewing his title to it; which is all that he has to do in relation to the inquisition, and it is not material to him whether the inheritance be in the King or in any other; and as it seems the statute is strictly penn'd to prevent the termor to dispute the title of the King to the inheritance; and inasmuch as it can't be any prejudice or advantage to the termor if the inheritance shall continue in the King, and it may be prejudicial to the King, if it should be traversed and found against the King, therefore 'tis reason that the defendant shall not be admitted to traverse it. 2 Law. 1008. Pasch. 10 W. 3. The King v. Hungerford.

6. A *forfeiture* of the office of *Marshal* of the King's Bench, (which is an office of inheritance) was found by inquisition out of the petty-bag office; and it was strongly moved by the King's counsel for a writ of seizure. But the Lord Keeper, upon great consideration, did refuse to grant it, and gave the defendant a reasonable time to *traverse the inquisition peremptorily*. Hill. 5 W. & M. in Canc. For although the inquisition finds a title in the King, yet the inquisition is traversable; and 'tis very hard to turn a man out of possession upon a bare inquest of office, without hearing what the defendant hath to say for himself. L. P. R. 630.

7. Inquisition upon a *melius inquirendum* is traversable; because it is not taken *super visum corporis*; for an inquisition *super visum corporis* is not traversable. Carth. 72. Mich. 1 W. & M. B. R. The King v. Bonny.

8. A tenant for life remainder to B. in fee. A. is attainted. The King seizes. In this case B. may *enter on the King*. Otherwise, if an office had found A. seized in fee. 2 Salk. 469. Hill. 8 W. 3. B. R. Linch v. Cote.

### (G. 2) *Traversed. In what Cases, and how.*

1. BY 34 E. 3. stat. 1. 14. *Traverses of offices found before the escheators shall be tried in the Bench.*

2. It was found by office return'd in Chancery that W. of H. was seized of certain land in B. and was aiding to M. P. enemy of the King, by which the land was seized into the hands of the King; whereupon came the said W. of H. and *travers'd that he was not aiding &c.* Br. Traverse de Office, pl. 46. cites 43 Aff. 28. — [ 88 ] And such an office appears the same year, p. 29. and such a traverse to it. Ibid.

3. A man cannot traverse the title of the King without title by office. Br. Traverse de Office, pl. 22. cites 50 Aff. 2.

As where it was found by office

that W. was seized in fee, and held of the King in capite, and died seized; and R. who is an idiot, is his heir, and that M. enter'd, and seire facias issued against M. to say why the land should not be seized for the King for idocy? who came and said, that R. released all his right to P. S. who incoffed

*inferred him, at which time R. was of good memory, absque hoc, that he was a fool natural a nescivitate; Prift; and admitted for a good traverse; and he said further, that the land is held of D. C. absque hoc, that it is held of the King, prout &c.* Skipwith said, You cannot have this issue unless the King was in possession; for by the office found, of this tenure and alienation, the King shall be in possession, and then you may traverse it, but not now; for then you will toll the King of the seisin which the King might have after the office is found. Br. Traverse de Office, pl. 22. cites 50 Aff. 2. Br. Office devant, pl. 24. cites S. C.

4. By 23 H. 6. cap. 17. s. 2. *If any will traverse an office, no protection shall lie for the patentee; and concerning the demise of the land to him that tenders a traverse, the stat. of 36 E. 3. 13. 8 H. 6. 16. and 18 H. 6. 6. shall be duly observed.*

Br. Non-  
suit, pl. 34.  
cites S. C.

5. In traverse of office the plaintiff in the traverse was nonsuited, and per Cheney J. clearly the plaintiff may have a new traverse; for traverse is given by statute; for at common law, he whose land is seised into the hands of the King, had no other remedy but by petition, and if he was nonsuited in the petition, he might have a new petition, and the traverse is given in lieu of petition; and therefore if he be nonsuited he may have a new traverse. But, per Hals, the statute gives only one traverse, and therefore if he be nonsuited he shall not have another traverse. *Quere* inde; for where statute gives action, as maintenance, decies tantum &c. which were not at common law before, it seems that the party may be nonsuited and have a new action, and traverse is in lieu of action, Br. Traverse de Office, pl. 16. cites 4 H. 6. 12.

Br. Office  
devant,  
pl. 37. cites  
S. C.

6. Where the King is intitled by double matter of record, a man shall not have traverse, as where tenant of the King is attainted of felony, and after it is found by office that he was seised of certain land at the time &c. Br. Traverse de Office, pl. 31. cites 3 E.

4. 24.

7. If the King enters into my land by office, and there is no such office, I may traverse and say that nul tiel record. Br. Traverse de Office, pl. 32. cites 4 E. 4. 21.

8. *A. was bound to two* in an obligation *iz 40 l. and the one was felo de se*, which was found by office; and per Choke J. it is all forfeited to the King; but Young contra; for the survivor takes place before the office, and it was touch'd, *if the other might traverse the office, that he did not kill himself feloniously: for if it be found before the Coroner, that a man killed [another] feloniously, none can traverse it; for this is an ancient law of the Coroner; contra it is said in this case; nota.* Br. Traverse de Office, pl. 36. cites 8 E. 4. 4.

9. It was found by office, *that the Duke of E. was seised of the manor of D. and died seised, and the King is heir, by which the Earl of L. sued to the King by petition, in as much as he was seised, and disseised by the Duke, and pray'd restitution, and process continued till he had restitution, and after the Earl gave it to E. in tail, and then it was found by another office, that the said Duke was seised of 40 acres in D. and C. and died seised, and the King is heir, by which the King by patent gave it to W. S. and came the said E. the donee, and shewed the first matter, and that the 40 acres are parcel of the said manor, and pray'd restitution; and upon this*

this *fiere facias* was awarded against the patentee, and he came and pray'd search &c. And per Sotel, at common law there was no traverse but petition; and this was in lieu of writ of right for the party, and to avoid delays was the statute made; that a man may traverse the office, which statute does not toll the search which was at common law, but the petition. Per Spilman, the statute which gives traverse is only of ward, and of fine for alienation &c. which are only chattles, and of those was no traverse at common law; but of franktenement traverse was at common law. Per Yelverton, peradventure such manner of monsttrans de droit, as above, was at common law; for the first matter above was petition, but the second matter upon the second office is to be taken only as a monsttrans de droit; so by him such monsttrans de droit was at common law, but no traverse in any case; but first he ought to have had petition to enable him to traverse &c. Per Spilman, in case where a man may traverse an office he may sue by petition; quod non negatur. Br. Traverse de Office, pl. 18. cites 9 E. 4. 51.

[ 89 ]

10. Office was returned upon diem clausit extremum, that *W. was seised of the manor of T. and held of the King in chief, and was seised of another manor in tail to him and his heirs of his body begotten, which was held of T. by knight's service &c. and that A. was cousin and heir of the said W. viz. daughter of R. son and heir of the said W. and upon this came one Richard and said, that the manor which was held of C. was given to the said W. and to the heirs males of his body, and that the said W. had issue the said R. father of Alice the eldest, and the said R. youngest, and of such estate died seised, and prayed to be admitted to his traverse of the office; and the opinion of the Court was that he shall be well received to traverse the office.* Br. Traverse de Office, pl. 37. cites \* 12 E. 4. 18.

But where it is found by office that the youngest is heir where the eldest is heir in fact, the eldest has no remedy; because both claim from one and the same ancestors; for there the King has cause to

seize; and e contra here of the manor held of C. For the one, viz. A. the daughter is heir to the one manor and the youngest is heir to the other manor; for the statute, which wills that the King shall have the custody of all lands, is intended where it descends to the same heir to whom the land held of the King descended; but where any parcel descends to another heir, he shall not have it; and the same law where the other had special tail in part, the remainder over. Br. Traverse de Office, pl. 37. cites 12 E. 4. 18. \* [Both the other editions are 2 E. 4. 18. but they are misprinted.]

11. A manor was given to *W. S. and E. his feme, and to the heirs of the body of W. S. the remainder to the right heirs of this same W. S. who had issue J. S. who was seised of another manor held of the King in capite in chivalry; and W. S. died seised, and E. survived, and J. S. had issue J. S. knight, and died, and the King seised the body of J. S. knight for his nonage, and after E. died, and diem clausit extremum issued to inquire of what lands she died seised, upon which the gift made to W. S. and E. was found as above, and that the manor was held of the bishop of E. and that the heir in ward is the next heir, by which the King seised the manor held of the bishop of E. &c. And after the heir in ward died without heir, by which issued a commission in nature of a diem clausit extremum to enquire of what lands and tencments*

ments the heir in ward died seised, upon which it was found that he died without heir, and that the one manor is held of the King in capite; and the other of the bishop; and the bishop would have traversed for his escheat. And per Hody, after the death of the heir in ward within age a *devenerunt* shall issue, and not *diem clausit extremum*, and if the party fail the right order and course of offices; in such case he shall never have livery; and yet the office is good for the King, but the party shall not have traverse in this case, but ought to sue in another office in due order; and then he may traverse; which matter was agreed per totum. But in this case, if the King ought to have prerogative of the sued in remainder, then the office is good for the King, and ill land by the party, upon which he shall not have traverse. But if the King ought not to have prerogative of the manor held of the bishop, then the *diem clausit extremum*, or commission in nature of a *diem clausit extremum* is well sued, and then the bishop may traverse; but Brooke says, quære what he shall traverse; for it seems, that all the office is true, and then it seems that he shall have petition, or *monstrans de droit*. Br. Traverse de Office, pl. 14. cites 15 E. 4. 10. Skrene's Case.

[ 90 ] 12. Things whereof the King is not in possession by office, as of rent and common &c. there a man may traverse by way of plea in trespass, replevin &c. brought by the King against him. Br. Traverse de Office, pl. 40. cites 20 E. 4. 14. and 21 E. 41.

Contra where the King is intitled by a certain time, and makes livery within the time, and yet the traverse remains good. Ibid.

13. Office found for the King after the death of the tenant, his heir of full age. *J. S. traversed the office, and did not pray to have the land in farm, and after the King made livery to the heir, and then the traverser prayed that the land be resealed, and that he may have it in farm, and could not have it; for the livery was lawful, and he may sue against the heir, and the King will not do the heir so much wrong as to deny to make livery.* Br. Traverse de Office, pl. 23. cites 1 H. 7. 21.

14. It was found by office that *W. B. was seised in fee of the manor of B. and died seised, and held of the King in capite, and that A. was his sister and heir aged 40 years, and B. came and traversed the office, in as much as W. B. infeoffed him; absque hoc, that he died seised or held in capite prout &c. and pending the traverse A. the heir had livery, and there it was doubted if the livery be good or not; but it seems that it is good.* Br. Traverse de Office, pl. 24. cites 1 H. 7. 27.

Br. Petition, pl. 20. cites 8. C.

15. Traverse shall be only where livery may be made, and not where it is found by office, that *A. was seised for term of life, the reversion to the King and died; for there shall not be livery, therefore no traverse shall be; per Hussey.* Br. Traverse de Office, pl. 26. cites 3 H. 7. 3.

16. Office was returned in Chancery that the tenant of the King had aliened certain land without licence, and the alienee would have made fine, and had livery of the land, and the King's attorney surmised that the feoffment was made to the use of the King, and prayed that the land remain in the hands of the King. And the Chancellor said, the alienee shall have livery; for this matter touches

touches all the realm, and it is only surmise which is made for the King, which shall not delay the party of right; but if such matter for the King appeared by matter of record in the Court, it should be otherwise: but upon surmise there is no reason to put the party to a traverse. Br. Surmise, pl. 6. cites 4 H. 7. 5.

17. It was found that J. S. died seised, by which came W. N. his son, and said that the said J. S. in his life was seised in fee, and infeoffed A. and B. in fee, to the use of the said W. N. and his heirs, and died, and after by the statute of uses anno 27 H. 8. he was seised in possession, *absque hoc* that J. S. his father died seised *prout* &c. It is a good traverse. Br. Traverse de Office, pl. 50. cites H. 29. H. 8.

18. 2 & 3 E. 6. cap. 7. A traverse, or *monstrans de droit*, is given without petition, tho' the King be intituled by double matter of record.

19. 2 & 3 E. 6. cap. 8. f. 7. Where it is untruly founden, that any person attainted of treason, felony or premunire, is seised of any lands at any time of such treason, felony, or offence committed or after, whereunto any other person hath just title of freehold; every person grieved thereby shall have his traverse, or *monstrans de droit* without being driven to any petition of right, and like remedy and restitution upon his title found or judg'd for him, as hath been used in other cases of traverse.

### (G. 3) Traverse. What Offices may be traversed.

1. ALL offices which are found ought to be traversed, but offices <sup>At where</sup> found after the traverse need not to be traversed. Br. <sup>the King</sup> Traverse de Office, pl. 9. <sup>seised certain</sup>  
*land by two*  
 offices, by the one of which it was found that J. S. was seised of certain land held of the King, and died his heir within age, and by the other that this J. S. was seised of others held of a common person, and alien'd in fee by collusion to the intent to infeoff his heir at full age, where in truth those were the lands of S. C. and the King granted the land and ward to J. S. by which S. C. came and traversed the one office and the other, that he himself was seised of the land till by those false offices ousted, and traversed that the father of the infant was not seised of the one land, nor that he did not make feoffment by collusion of the other land; and tendered traverse [ 91 ] upon another point, that is to say, three points in all, and had *scire facias* against the patentee to have the patent repeal'd; and the patentee and the counsel of the King took issue upon the one point only, viz. that the father of the infant was seised of the one and the other, and died seised, and found for S. C. by which he prayed judgment and livery, and Norton alleged in arrest, because the collusion is not try'd. And the opinion was, that yet he shall have judgment; for the King and party took issue upon another point, that is to say, upon the dying seised, and the feoffment by collusion is contrary to it; for he cannot die seised, and yet make a feoffment by collusion, and the King cannot change his issue after trial of it. Br. Traverse de Office, pl. 9. cites 9 H. 4. 6.

\* Orig. (summoner).—† Br. Prerogative, pl. 13. cites S. C.

2. Where a man does felony, and after infeoffs A. of his land, and after is convicted of the felony by verdict of 12, there A. cannot traverse to save the land by saying that he was not guilty of the felony; the reason seems to be inasmuch as none can have attaint to reverse this verdict privy or stranger; for the indictment was by other 12, and so guilty by 24. Br. Traverse de Office, pl. 35. cites 7 E. 4. 1. 2.

*But if he had confessed the felony, there the feepee may traverse that the felon was not guilty &c.*  
 Ibid.—

Br. Ekoppel, pl. 163. cites S. C.  
 (G. 4)

(G. 4) Traverse, by *what Persons* it may be  
Capacity.

1. **I**T was found by inquest of office that certain land was given to a man and his feme for their lives, which baron alien'd in fee, by which he in reversion entered, and was a sott, viz. a fool, whereupon the King seised &c. and this office was traversed in the Chancery for the King, viz. as it seems, that the feme had no such estate, quod mirum! for it seems that it cannot be traversed for the King; for the office is the title and declaration of the King, and therefore he cannot traverse his own title; but execution was awarded, and this for the feme, as it seems. Br. Traverse de Office, pl. 20. cites 29 Aff. 43.

Br. Petition, 2. He who is admitted to petition sent indorsed into Chancery, pl. 17. cites when he comes there shall traverse the office found for the S. C. King in his petition; quod nota. Br. Traverse de Office, pl. 21. cites 37 Aff. 11.

3. A man was outlawed of murder, and after it was found before the Coroner, that he purchased land after the felony, and thereof incoffed J. N. who never took the profits, by which scire facias issued against him to answer to the King of the issues, who came and said, that he would traverse the office; but per Percy, you cannot; for he is outlawed of felony; and per Hennington, the party himself shall not be received to traverse the indictment or the felony without answering to the outlawry; but we who are strangers may traverse the indictment; for it is only an inquest of office, and may say that he had nothing at the time of the felony, nor ever after. But by the Reporter, if the felon be indicted, and attainted at his own \* costs, the scoffee cannot traverse the felony, and after, the year and wast was adjudged to the King, and of the rest they would advise. Br. Traverse de Office, pl. 4. cites 49 E. 3. 11.

\* Orig. (a  
fa mys de-  
mesne.)

Br. Tenure, 4. The King was falsely intituled to a ward of the heir of R. C. pl. 21. cites by tenure of him in fee, where in truth R. C. was tenant in tail, S. C. the reversion to A. the heir of his donor, there A. traversed the office, and it was adjudged for him upon demurrer; quod nota. Br. Traverse de Office, pl. 17. cites 4 H. 6. 19. 20.

5. If it be found by office, that A. held of the King by knights service, where he held of N. in socage, there the lord cannot traverse, because the ward does not belong to him, but a prochain amy of the infant shall traverse it; quod nota. Br. Traverse de Office, pl. 30. cites 6 H. 7. 15.

And if he  
holds land  
of another  
lord, this  
lord may

[ 92 ]  
traverse the  
office for  
his interest.

Ibid.—And by the same reason he himself when the office is false in tenure and in matter, shall have traverse there by the common law; quod Cateby, Nele, and Hussy concesserunt. Ibid.

7. It was found by an office *virtute officii*, that one *J. S. tenant of the King*, gave land to *T.* and his heirs males &c. and he as coſin and heir claimed &c. and it was found *virtute brevis*, that he gave to the ſaid *T.* in tail general, who had four daughters, who claimed the land, and tendered their traverse to the firſt office, ſaying, that it was not given in ſpecial tail as above, and that they are heirs, and one of them was within age &c. and ſo ſee that an infant may traverse, and it was found for the heirs general, and they pray'd judgment and ouſter le main of the King. Per Grevil, the traverse is in the Chancery, and is ſent here to be try'd, and therefore ſhall be ſent there, and judgment ſhall be given there, and not here, as of foreign voucher in Cheſter, or foreign releaſe; but per Brudnel J. there thoſe two Courts are not at common law \* as to the voucher and foreign releaſe, but where thoſe Courts are at common law it ſhall not be remanded, as record removed from C. B. here into B. R. it ſhall not be remanded, but we will give judgment here. Per Fineux C. J. if title of the King be found againſt him, judgment ſhall be given here, and the hands of the King ſhall be amoved: and if error be in Cheſter and redreſſed here, we will give judgment and make execution here. And after the Juſtices were purpoſed to give judgment againſt the heir general and would be adviſed of the livery; quod nota. But Fineux once ſaid there, that an infant cannot traverse, contra it ſeems here: for the one was an infant in fact, and yet they were in opinion to give judgment. Quære if the age appeared to them of record; it ſeems that it did by reaſon of the office. Br. Traverse de Office, pl. 19. cites 21 H. 7. 35.

Br. Parel on  
Plea, pl. 4.  
cites S. C.

\* Orig.  
(del.)

8. None can traverse, *unless he makes title to the ſame land in the premiſſes, or ſpeaks of his traverse*. Br. Traverse de Office, pl. 48. cites 22 H. 8.

9. Two traversed an office, and at the *Nifi Prius* it was ſhewn by record, that the one was outlaw'd, by which the Juſtices ceaſed; and in Bank it was ſaid by Englefield, that they did ill; for they had no power to allow the outlawry, but only to take verdict; but Fitzherbert contra; for traverse is in lieu of action, and therefore if the one be outlaw'd he cannot have it, and ſo it was ruled; quod mirum! Br. Traverse de Office, pl. 1. cites 26 \* E. 8. 1.

\* It ſhould  
be H. 8.

10. *Terror* cannot traverse office by the common law, unless it was found in the office, and then he may have monſtrans de droit, and ouſter le main. Br. Traverse de Office, pl. 50. cites H. 29 H. 8.

### (G. 5) *Scire Facias* and not *Traverse*, in what Caſes it ſhall be,

1. IF the King re-ſeiſes or reſumes after livery by cauſe ſhewn, the party griev'd ſhall have traverse to the cauſe, and ſcire facias againſt the tertenant; but if it be without cauſe ſhewn, he

is put to petition to the King, and scire facias against the tenant. Br. Traverse de Office, pl. 5. cites 2 H. 4. 10.

[ 93 ] 2. The Duke of N. was *seised of the office* of the marshalsea in tail, and granted it to W. B. for life with warranty and dy'd, and it was found that the Duke died *seised of the office in tail*, by which W. B. was out of possession till he had traversed, and he who traverses, if it be found for him, shall have scire facias against him who has the office or the thing for any estate certain, contra against him who has only at will. Br. Traverse de Office, pl. 33. cites 5 E. 4. 3.

Br. Record, pl. 60. cites 14 E. 4. 6. S. C.—Br. Pleadings, pl. 104. cites S. C.

3. In a *traverse of office in Chancery* they were at issue, which was sent into B. R. to be try'd, and he who tendered it came and said, that the King had granted the land to P. by patent before the traverse, by which he ought to have scire facias against the patentee in Chancery, and had it not; for he would not proceed, but would have a new traverse; and it was said, that he cannot traverse in Bank; for they have only the transcript, and not the record itself; for this remains in Chancery; and by all the Justices in the Exchequer Chamber, he may have scire facias now in Chancery upon the first traverse; for mispleading there, nor default of form, is not material in Chancery; for it is a Court of Conscience. Br. Traverse de Office, pl. 39. cites 14 E. 4. 1. 7.

### (G. 6) *Affise or Traverse.* In what Cases.

1. WHERE the King is intitled to a chattel, as ward or livery by false office, and the heir sues livery, the party may have affise; contra it seems where the King is intitled to the fee by false office, and the donee ousted, the party is put to his traverse. Br. Traverse de Office, pl. 7. cites 7 H. 4. 17.

### (G. 7) Where the Party may *Traverse*, or shall be put to his *Petition*.

S. P. Br. Traverse de Office, pl. 32. cites 4 E. 4. 21. —But where a man is attainted of felony or treason, or outlaw'd in debt or trespass,

1. IF a man be attainted of treason or felony, by matter of record, and also it is found by office, that he was seised of such land at the time of the attainder, and the King grants it over, where in truth J. N. was thereof seised in fee at the time &c. J. N. cannot enter, nor have action or traverse, but is put to his petition, by reason that the King is intitled by double matter of record, viz. the attainder, and the office. Br. Traverse de Office, pl. 51. cites 10 H. 6. 15.—And the like was held for law P. 33 H. 8

and after it is found by office which rehearset the attainder, and that at the time of the felony, outlawry, or the like, he was possessed of such a horse &c. and in truth the horse &c. were the goods of J. N. and in his possession, or that the property was in the said J. N. There J. N. may traverse for such personal thing, or other suit, without suing by petition, notwithstanding that the escheator or other had seisin of the goods for the King, or by fresh suit against him who was attainted or outlawed. Ibid.

2. So where the King is intitled by office only, there the party grieved may traverse. Br. Traverse de Office, pl. 32. cites 4 E. 4. 21.

2. But

2. *But where the King has no other title but by false office, there the party who may make title may traverse as well against the King as against the party, if the King had granted it over; but now this is aided by the statute of anno 2 E. 6. cap. 8. Ibid.*

See the Statute at (G).

3. *If the King enters upon me by matter in fact, or otherwise without record, I shall sue by petition. Br. Traverse de Office, pl. 32. cites 4 E. 4. 21.*

So if a man enters upon me, and in-seoffs the King by

*deed inroll'd, I am put to petition. Ibid.——So if a man be seised of land, to which I have right and is impleaded, and says that he holds for life the reversion to the King, and he dies, and the King enters, I am put to petition. Ibid.*

[ 94 ]

4. *And at common law, if the King was intitled by false office, the party had no other remedy but by petition, and now the statute gives traverse where the King is intitled by office, and therefore if there be other matter than the office, as the attainer above, traverse does not lie, but partition; for it is out of the case of the statute. Ibid.*

5. *And where land comes to the King by forfeiture by record, out of which I have a rent-charge or rent-seck, which is not found in the office, I am put to petition. Ibid.*

Br. Office  
devant, pl.  
38. cites  
4 E. 4. 22,  
23. S. C.—

*But if the rent had been found in the office, yet he should not distrain upon the King; but if the King grants the land over, he may distrain the lessee; contra if the rent was not found in the office. Br. Traverse de Office, pl. 32. cites 4 E. 4. 21.*

6. *The same law of execution of a statute merchant &c. as of the rent; and those cases are where the King is intitled by matter of record; contra where he is intitled by matter in fact, as where a man in-seoffs the King of land charged to me, I cannot distrain, but if the King gives it over, there I may distrain; and where the King ousts me without office or record, I cannot enter nor distrain; but if he gives it by patent or otherwise, then I may enter or distrain; contra where the King is intitled by office. Ibid.*

## (G. 8) Judgment and Execution of Traverse. How.

1. **L**ANDS of a prior was seised supposing that he was a prior alien, who came and said that he was born in Gascoigne within the allegiance of the King, and this being found, he was restored, and had ouster le main; and so it seems that the execution of every traverse is ouster le main; for a man cannot enter upon the King. Br. Traverse de Office, pl. 49. cites 27 Aff. 48.

The judgment of a traverse is no other but quod manus Domini Regis amoveatur et quod possessio restituatur

so him who traversed. Br. Traverse de Office, pl. 54. cites Frowike's Reading.

(H) *How it must be returned or received, and where.*

Escheator returned office in the Exchequer which was not indented; and the Justices said that he ought to have imprisonment of two years, and make fine to the King by the statute \* 37 E. 3. Br. Office devant, pl. 10. cites 15 E. 4. 10.—\* This seems to be misprinted; and should be 36 E. 3. Stat. 1. cap. 13.

1. 36 E. 3. Stat. 1. Enacts that enquests shall be taken openly and by indenture. And if the escheator do contrary to this act, he shall suffer two years imprisonment, and be ransomed at the King's will.

If the escheator charges an inquest who afterwards are agreed upon their verdict, and they deliver it in paper to the escheator; this, before the ingrossing, indenting and sealing it, is no verdict. D. 170. a. b. pl. 2. 4. Mich. 1 & 2 Eliz. Ld. Powes's Case.—By 36 E. 3. and 3 H. 8. an office in paper as this was is of no effect. Jenk. 218. pl. 64. cites S. C.

2. 8 H. 6. cap. 16. Enacts that the escheator or commissioner shall return the office within a month on pain of 20 l. to be divided betwixt the King and the prosecutor.

[ 95 ] 3. 18 H. 6. cap. 7. Enacts that the escheator shall return an office found before him into the Chancery or Exchequer within one month after the taking thereof, in pain of 40 l. given by the statute of 8 H. 6. 16. and besides to answer so much to the King as he is dam-  
Office virtute brevis or commissionis, shall be returned in Bank,

and traversed there, & Office virtute officii shall be returned in the Exchequer, and traversed there, viz. in the Exchequer. Br. Traverse de Office, pl. 32. cites 4 E. 4. 24.

4. 23 H. 6. cap. 17. Enacts that the escheator shall take his inquest within one month after the delivery of the writ unto him, and that in some good town openly.

5. By 1 H. 8. cap. 8. §. 1. If any escheator or commissioner return into any of the King's Courts any inquisitions or offices concerning hereditaments, not found by the oaths of 12 men, and indented and sealed; the same escheator or commissioner shall forfeit for every such office or inquisition 100 l. to the party grieved, and no man shall sit by virtue of any commission to inquire of hereditaments, except he have hereditaments of the yearly value of 40 marks above reprises upon pain of 20 l. and it shall be lawful for all persons that be not sufficient of freehold at the time of any such commission, to refuse to sit and inquire by virtue of the same commission.

6. The Court ought not to receive the office, tho' one would affirm on oath that it is the very office; but it ought to be brought in under the Great Seal of England. And also the Court shall not receive it without a writ. 1 Le. 65. Mich. 29 & 30 Eliz. C. B. Moile v. the Earl of Warwick.

(H. 2) *Proceedings.*

1. OFFICE found alienation without licence before the escheator, and it was returned into the Exchequer, and then sent into the Chancery, and then into B. R. to be discussed upon traverse;

verse; quod nota, the order of it. Br. Office devant &c. pl. 6. cites 7 H. 4. 41.

2. 1 H. 8. cap. 8. f. 4. Enacts that the inquisition shall be taken by indenture, whereof one part shall remain with the foreman, and the other part is to be delivered by the commissioners or escheators into the petty bag-office, from whence it is afterwards to be transcribed into the Exchequer; and the jurors shall present by indenture, in pain to forfeit 20 s. a-piece. The escheator also, or the commissioners, or some of them, shall receive the jurors presentment without delay, in pain of 5 l.

The officer in the petty-bag shall file the office within three days after receipt thereof, in pain of 40 l.

The officer in the Exchequer that refuseth to receive an office upon tender, shall forfeit 40 l. and then the escheator or commissioners shall be discharged of their forfeiture of 40 l. for not returning the office within a month, so that they return another into the Chancery or Exchequer (as the cause requires) within a month after the first month.

The clerk of the petty-bag shall send a transcript of the office into the Exchequer, the next term after he receives it, in pain of 5 l.

3. By 1 H. 8. cap. 10. f. 3. After office found afore any escheator or commissioner put into the Chancery or Exchequer, if any person which will tender a traverse to the said office, and desireth to have the lands to farm, and find surety, and sheweth evidence to the Chancellor, according to the statute 8 Hen. 6. cap. 16. come into the Chancery within three months after the office so put into the Chancery or Exchequer, he shall be by the Chancellor thereto admitted, and all other grants thereof be void.

4. 2 & 3 E. 6. cap. 8. f. 13. Enacts that in all such cases, as any person shall be enabled by this act to have any traverse, and shall pursue his traverse, he shall sue writs of sci. fa. against all such as shall have interest by the King or his patentees, as is requisite upon traverses or petitions heretofore pursued. And in every such sci. fa. the patentees or defendants shall have like pleas, as they had in any sci. fa. before this time awarded against any patentee in any case of petition; and upon every traverse pursued by virtue of this act, in such case as the party that shall pursue should by the common law have been put to sue by petition to the King, there shall be two writs of search granted, as like writs have been granted upon petitions made to the King.

party may traverse any of the material averments.

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Note in many cases two matters of record with necessary averments shall amount to an office, but thereupon a sci. fa. is to be granted, wherein the 2 Inst. 694.

## (I) False Inquisition.

1. **WHERE** the King is intitled to the ward of land and body by office before the escheator, and after the feme comes and surmises that the land was to her in tail, and has writ to the escheator to find it, who finds it, and upon this has ouster le main, where the inquisition is false, because there was no such gift in tail, there this is an intrusion upon the King, and his dying seised shall not toll the right heir. And so see that after office found for the King it cannot be defeated but by traverse, or the like, and not

See (G) pl. 2.—(G. 4) pl. 5. 6.—(G. 7) — Br. Entry Cong. pl. 27. cites S. C.—Br. Office devant, pl. 9. cites S. C.

by other inquest of office. Br. Traverse de Office, pl. 12. cites 21 E. 3. 12.

2. None shall have livery but he who has office found for him; and this is to be understood of general livery; but *he who has title and no office found for him* may traverse false office found against him. Br. Traverse de Office, pl. 45. cites 43 Aff. 20.

3. If it be found that *J. S. who is outlawed in action of debt &c. is seised of my land* which is false, by which the escheator takes the profits, I may disturb him without traversing the office; for upon such outlawry the King shall not seise, and then I may retain my possession; per Cotteshmore; quod fuit concessum. Br. Traverse de Office, pl. 43. cites 9 H. 6. 20.

Br. Office  
devant &c.  
pl. 40. cites  
S. C. ac-  
cordingly.—  
\* See the  
Statute at  
4G. 2).

4. If it be found by office, *that the tenant of the King died seised his heir within age*, viz. of the age of two years, where he is of the age of ten years, he has no remedy; but Brooke says the law is contrary now by the statute of \* 2 E. 6. cap. 8. but by the common law no traverse was given in this case. Br. Traverse de Office, pl. 47. cites 5 E. 4. 4.

5. A man shall have his traverse where the office is false. Br. Traverse de Office, pl. 26. cites 3 H. 7. 3.

6. Where the tenure is found of the King, as of his duchy of Lancaster, where in truth it is false, yet this need not to be travers'd; for the King has this duchy as Duke, and not as King, and a man shall not be put to traverse, unless where office is found for the King as for the King of England; for then he has prerogative, and as Duke no prerogative. Br. Traverse de Office, pl. 53. cites H. 1. E. 6.

See (B) pl.  
1. in marg.

### (K) Relation thereof to what Time &c.

1. *Tenant for life with clause of re-entry* is attained, the reversioner enters, the office shall not relate to take the freehold out of the reversioner. Arg. Godb. 317. cites 27 Aff. 30.

[ 97 ]  
But where it  
is found by  
office, three  
years after  
the aliena-  
tion, that  
the tenant of

the King alien'd without licence, this shall not have relation to give the mesne profits: for it is only nomine distributionis. Ibid.—But where it is found three years after the alienation that the tenant alien'd in mortmain, there he shall have the mesne profits; for this gives him title to the land: per Choke; quod fuit negatum; for the lords mediate and immediate shall have their times. Ibid.

Br. Traverse  
de Office,  
pl. 15. cites  
S. C.

3. Office shall have relation to the death of the tenant of the King, tho' it be found after, and shall avoid mesne acts by this relation, as collation by lapse &c. mesne between the death and the office found. Per Higham. Br. Office devant &c. pl. 11. cites 14 H. 7. 22. and 15 H. 7. 6.

4. If recovery be had against the heir before office, and after office

office is found, the recovery bars the heir; and *so of seoffment made by the heir before office*, this bars the heir; for the office found after gives the King only the profits. Br. Office devant &c. pl. 25. cites 1 H. 7. 17. per Rede.

5. The office shan't have any relation for the profits beyond the time of the attainder; tho' for avoiding incumbrances made by the person attain't, it shall have relation to the time of the treason done. Pl. C. 488. b. Mich. 17 & 18 Eliz. Nichols v. Nichols. — 2 Roll. R. 421. accordingly per Jones J. and he said, that as to the vesting the freehold, it has relation only to the time of the office. — Jo. 78. S. P.

6. A. entered into a statute of 1000 l. to B. and afterwards B. was a fugitive beyond the seas, in 27 Eliz. afterwards and before any office found, B. returned and released the statute; and afterwards office is found: this release shall not bar the King; for he was intitled by the flight, and the office was but an informing of him, and the statute was in him before the office. Cro. J. 82. Mich. 3 Jac. B. R. The King v. Wendman.

(L) In what Cases Forfeiture shall be before any Office found.

See Forfeiture (C) Treason.

1. IF one departs out of the realm without licence, and upon a special command under the Privy or Great Seal, to return by a certain day upon pain &c. he refuses, his lands and chattels shall be seis'd to the Queen's use for the contempt. D. 128. b. pl. 61. Hill. 2 & 3 P. & M. Anon.

A precedent was then shewn of the like matter in 19 E. 2. in Scacc. against the Earl of

Richmond, call'd William de Brittain. Ibid.

2. A sheriff of the county of W. for term of his life, or in fee, was indicted for escapes of felons felonice & voluntarie; and also was indicted for holding his tourn in loco non consueto contra formam statuti de Magna Charta. The indictments were removed in B. R. and the King's attorney brought an information against him upon the indictments: and per Cur. the office of the sheriff was seised into the hands of King quousque &c. and this without scire facias, or any other process awarded against him &c. D. 151. b. pl. 4. Mich. 4 & 5 P. & M. Sir John Savage's Case.

3. Goods of *felo de se* are forfeited before inquisition. 1 Lev. 8. Mich. 12 Car. 2. B. R. The King v. Ward executor of Wentworth.

1 Saund. 275. Contra per the Reporter, Trin. 21

Car. 2. in Case of the King v. Sutton. — 1 Hawk. Pl. C. 63. cap. 27. f. 9. Contra, that no part of the personal estate is vested in the King before the self-murder is found by some inquisition.

4. Nothing can be forfeited as a *deadand*, nor seised as such, [ 98 ] till it be found by the Coroner's inquest to have caused a man's death. 1 Hawk. Pl. C. 67. cap. 26. f. 8.

(L. 2.) *At what Time it ought to be found.*

1. OFFICE shall not be taken *after* office upon a surmise, which is contrary to the matter of the first office; contrary, if it stands with the matter of the first office. Br. Office devant &c. pl. 33. cites 4 H. 7. 15.

2. If the King grants land for life, and after the patentee dies, yet the King cannot grant it over till the death be found by office; and this by the statute 18 H. 6. Br. Office devant &c. pl. 56. cites 29 H. 8.

(M) *Pending Traverse of another Office.*

S. P. Br.  
Office de-  
vant, pl. 8.  
cites 11 H.  
4. 80.

1. IT was found that the tenant of the King died seised, his heir within age, and the King seised the ward and granted him over; and the feoffees came and traversed the office that the ancestor infeoff'd them, absque hoc that he died seised, and had scire facias against the patentee to repeal the patent: and the defendant said that there is another office found; also that the feoffment was, by conclusion &c. Judgment if he shall be compelled to answer to the writ; this office is not traversable. And because the office of the collusion was found pending the writ, by which the defendant averr'd by way of plea, that the feoffment was by collusion in maintenance of his patent, and so to issue upon it; and the party not compelled to traverse the last office; but contra if it had been found before his traverse; note the diversity. Per Norton, if pending the suit another office had been found which intituled the King to the fee simple, he shall be compelled to traverse it; Tirwhit said yes; for the King has a higher right by the one office than by the other; contra here, for the one and the other do not intitle but to the ward; and so see a diversity where the office which is found pending the first office is of the same effect, and where of a higher title. Br. Traverse de Office, pl. 11. cites 21 E. 3. 1. 2.

2. If it be found by office that the tenant of the King died seised of my land, by diem clausit extremum, quod falsum est, and the King seises, and after the heir dies in ward, and after it is found by another diem clausit extremum, as above, where mandamus ought to have issu'd; in this case I ought to traverse the one office and the other, before that I can have my lands out of the hands of the King. Per Gascoyn and Hulse J. Br. Traverse de Office, pl. 8. cites 8 H. 4. 17.

## (N) Of several consistent or contrary Offices found, and the Effect thereof.

1. WHERE office is found for the King, and another office is found contrary for one party, this *shall not discharge the office which serves the King*, but shall go to his traverse &c. Br. Office devant &c. pl. 9. cites 21 E. 3. 1.

S. P. Br. Traverse de Office, pl. 12. cites 21 E. 3. 1. 2.

2. If it be found by office that A. is heir, and within age, and by another office that B. is heir, there the first shall stand, and the second is void; for it intitles the King only to that which the first intitles him to. Br. Office devant &c. pl. 44. cites 14 E. 4. 4. 5. by the Serjeants.

[ 99 ]  
But if the last intitles the King to the escheator to fee, this is good; travers'd the

and he who is found heir before by the first office shall not have livery till he has the office. Ibid.

3. In assise it was found by virtue of the writ that J. T. was seised &c. and attainted of treason; and the same day, before the same escheator, it was found by the same jury, that the said J. T. was seised of other land at the time of the treason. And per Brudenell and Keble, the escheator cannot sit by virtue of the writ de diem clausit extremum, quæ plura, as here, or the like, and \* after by virtue of his office at one and the same time, but it shall be taken by virtue of the writ. But Butler, Hoberd, Rede, Wood and Fisher, contra, that the escheator may sit by virtue of the writ; and after by virtue of his office, and that it is not contrary: and that by the opinion of Husley, if diem clausit extremum finds the heir of the King's tenant of full age, and by virtue of his office he is found within age, yet he shall have livery; and therefore it seems that the last office is not well found, nor that it ought to have issued after the first; for it is contrary; but here it is not contrary, but the last office found lands which are not mentioned in the first office, and therefore well, which was not deny'd by the Court but that it was well; and it is not contrary, 'tho' it was one, and the same day, and by one and the same jury; for it may be at diverse hours and diverse instants. And so see that if the King be serv'd by one office, he shall not have another office which shall do contrary; contra if the last office stands with the first. Br. Office devant &c. pl. 35. cites 9 H. 7. 8.

## (O) Imperfectly found, Relieved or not, and How.

1. IT was found by diem clausit extremum in London, that J. N. tenant of the King died seised without heir, of land in London, by which the King granted it to T. N. for his life, and a writ to the Mayor to put him in seisin, who return'd that the said J. N. devised it by testament inrolled within the year to E. his son for term of life, who is yet alive, and the reversion to be sold by

by her : the grantee of the King enter'd, and E. su'd *scire facias* to re-have the land ; and because this devise is not found in the office, nor is any office found for the said E. the devisee, therefore the *scire facias* does not lie ; but by some E. may have assise. *Quære* ; it seems E. shall have petition or *monstrans de droit* ; for E. cannot traverse ; for the office is true, and the devise stands with the office, and both are true. Br. Office devant &c. pl. 19. cites 29 Aff. 31.

2. Where tenant in tail of an office grants the office to T. B. for life with warranty, and dies, and it is found by office that the grantor held of the King and dy'd, his heir within age, by this the grantee is out of possession of the office ; for it was found that he died seised of the office. Br. Office devant &c. pl. 39. cites 5 E. 4. 3.

[ 100 ] 3. It was found that J. S. and his feme infeoff'd the King in fee to their use, and the office awarded insufficient ; for the King cannot be infeoff'd without deed inroll'd ; for no livery can be made to him ; by all the Justices, and the office is insufficient ; for it cannot find matter of record as outlawry &c. and the King cannot be seised to another's use. Br. Office devant &c. pl. 41. cites 5 E. 4. 8.

4. Office in one county found J. N. heir, and within age, and in another county they found W. heir, and within age, who was a younger brother. And per Townesend, Justice, in this case the King shall have the ward of both till full age, and at full age they shall interplead which of them is right heir ; and he who is found right heir shall have livery of the whole ; but this cannot be discuss'd during their non-ages, for clear law : but see now 2 E. 6. 8. where this matter is remedy'd. And if both die within age, their heirs within age, several deventerunts shall issue into each county, according to the nature of the first office, and they shall interplead at full age, as their ancestors should do ; but if it be found that the one died without issue, and that the other is heir to him, there the interpleading is gone. Br. Office devant &c. pl. 27. cites 1 H. 7. 14.

### (P) Superfeded.

But where office is insufficient as to intitle the King by deed of feoffment which is not inroll'd, and

1. IF it be found by office that J. S. held such land in burgage, by which the land was seised into the hands of the King, superfedeas shall be awarded. Brooke says, quod mirum ! for it seems that ouster le main shall be after seisure, and superfedeas to the escheator before seisure. Br. Superfedeas, pl. 33. cites 7 E. 4. 17. 22.

and the King grants it by patent, special writ shall be awarded that the patentee shall not intermeddle, and the issues shall be deliver'd to him who was ousted. And so see that burgage land ought not to be seised into the hands of the King, as land of chivalry, or socage in capite. Ibid.

### (Q) Pleadings.

## (Q) Pleadings.

1. OFFICE found that H. S. was seised in fee, and leased to J. H. for life, and was attainted &c. and that J. H. is dead, and that M. & E. his feme, are tenants; by which scire facias issued against them, who came and said, that J. H. was seised in fee and died seised &c. absque hoc, that H. S. any thing had in demesne or in reversion at the time of the forfeiture; and because he did not deny the seisin of H. S. nor the lease for term of life to J. H. and did not shew how J. H. came to the fee before the forfeiture it is no plea to say that H. S. had nothing in the reversion, without shewing how H. S. dismissed himself of it; for which [reason] Knivet awarded that the King shall have execution, and that M. shall recover pro rata of one A. of whom he had pray'd aid before by \* partition made between E. and A. as daughters and heirs of J. H. Br. Office devant &c. pl. 22. cites 40 Aff. 24. \* Orig. (Partition.)

2. It was found by office return'd in Chancery, that W. of H. who was seised in fee of the manor of B. in the county of D. was aiding to G. M. enemy of the King, by which the land was seised into the hands of the King; upon which W. of H. came and said that he was not aiding, and prayed restitution, and upon the matter tried had restitution. Br. Office devant &c. pl. 23. cites 43 Aff. 28.

3. Office was traversed, it was found that J. N. held of the King immediately, and alien'd to W. P. without licence; and the office was return'd into the Exchequer, and after sent into Chancery, and thence into B. R. where the issue was if the land was held of T. C. who held over of the King, or of the King immediately, and it was found for the party; and notwithstanding that record was alleged that J. N. tenant had paid reasonable aid to the King for marrying his daughter as tenant immediate; yet because it was not pleaded, it was awarded that the party have livery out of the hands of the King, with the issues in the mesne time. Br. Traverse de Office, pl. 6. cites 7 H. 4. 41. [ 101 ]

4. None shall have land out of the hands of the King without making title. Br. Traverse de Office, pl. 38. cites 13 E. 4. 8. per Cur.

5. A man may confess and avoid the office, or other matter of record; as where it is found that tenant in tail remainder over in fee was, and that he in remainder is attainted of felony, and the tenant in tail is dead without issue, he who traverses may say, that before the statute of tail, and post prolem suscitata, the tenant in tail infeoff'd him, and that after he in remainder was outlaw'd, and the feoffor died without issue, and pray that the hands of the King may be remov'd; and this is good confessing and avoiding. Br. Traverse de Office, pl. 39. cites 14 E. 4. 1. 7.

6. In office of alienation without licence, it was touch'd by the Serjeants at the Bar, that if land be in the hands of the King \* Br. Traverse de Of.

## [Officers and] Offices.

see, pl. 27. by twenty diverse titles, the party shall answer to all the titles; but  
 cites S. C. if the party traverses one cause which is found for him, and after  
 but is, that another cause is found &c. the land shall not be seised again;  
 the land shall be seised again quod nota bene. Br. Office devant &c. pl. 32. cites 4 H. 7. 5.  
 [which seems to be misprinted; the year-book being agreeable to Br. Office devant &c. pl. 32.]

Br. Tra-  
 versede Off.  
 pl. 15. cites  
 S. C.

7. Where the King is not in possession by the office as in diverse cases, this may be traversed in the action which shall be brought by the King upon such office. But where the King is in possession by the office without action, there the party grieved shall traverse in the Chancery, where the office remains. Br. Office devant &c. pl. 11. cites 14 H. 7. 22. and 15 H. 7. 6.

8. Nonsuit or relinquishing of traverse is peremptory: contra of nonsuit in a petition. Br. Traverse de Office, pl. 54: cites Frowike's Reading.

[For more of Office or Inquisition in general, see Coroner, Elcheator, Prerogative, and other proper Titles.]

## [Officers and] Offices.

(A) Grant. By whom they shall be granted.

D. 176. 2. [1. 12 E. 1. Rot. Clausarum C Ytographarius in Banco amotus per  
 pl. 28. Hill. Membrana 8. breve, alius factus per Regem.]  
 a Eliz. cites  
 a precedent for the office of Chirographer, in these words, viz. Dominus Rex mandavit hic quas-  
 dam literas suas patentes, in hæc verba. Henr. Dei gratia, Rex Angl. Hæres & Regens regni  
 Franciæ, & Dominus Hibern. Omnibus ad quos presentes literæ perveniant, salutem. Sciatis  
 quod de gracia nostra speciali, ac de assensu concilii nostri, nec non de advisamento capitalis justiciæ  
 de com. Banco nostro, ac aliorum justic. nostrorum, concessimus dilecto nobis Rob. Kirkham  
 officium Chirographie in Banco nostro pred. habend. quamdiu nobis placuerit, cum feodo &  
 profic. ad idem offic. pertin. Proviso semper quod pref. R. in propria persona sua supradict.  
 officio, absque aliquo deputato sub se faciendo continue moretur, juxta form. ejusd. statuti, in hoc  
 parte editi & provisi. In cujus rei testim. has literas nostras fieri fecimus patentes. Teste Hum-  
 frido Duce Glocestrie, Custode Angliæ, apud Westm. 16 die Octobr. ann. regni octavo.

[ 102 ] [2. 18 E. 1. Rotulo Clausarum Membrana 17. Rex commisit  
 Johanni de Bradford officium Kirografici in Banco custodiendum  
 quamdiu Regi placuerit, & mandatum est Johanni Mettingham  
 & sociis suis Justiciariis de Banco, quod illud officium tenere per-  
 mittant donec aliud habuerint in mandatis &c. 1 E. 2. Rot. Pa-  
 tentium Membrana 18.]

[3. P. 1.

[3. P. 1. H. 4. B. R. Rot. 16. *Inspecimus Chartam Regis Richardi 2. factam Thoma Thorne Valeſio Buttellaric, ſuper officio Proclamatoris de Banco ſuo pro termino vite ſua.*]

[4. P. 9. H. 5. B. R. Rot. 5. *Dominus Rex concedit J. T. officium Proclamatoris Curie Regis.*]

[5. Tr. 2. H. 4. B. R. Rot. 25. *The office of the Maſhal of B. R. was granted by the King by his letters patents to William Finberrawe.*]

The Earl Maſhal of England granted the office of

Maſhal of B. R. as incident to his office, it having been forfeited by the attainder of the grantee for life; and therefore it ſeems that the Earl and not the Queen had power to grant it, and the rather, for that it was granted only for life. 4. L. 19. pl. 65. Mich 23 Eliz. B. R. The Queen v. Earl of Shrewsbury.

[6. *De conſeſſione officii Clerici ad negotia Regis coram Juſticiariis ad placita coram Rege proſequenda, & defendenda, (it ſeems it is the Clerk of the Crown.)* Hill. 1 E. 3. B. R. Rot. 1. Tr. 12 E. 3. Rot. 24. Mich. 23 E. 3. Rot. 1.]

7. Breve regium direct' Juſtic. de Banco, ad admittend' Rob. Darcy, ad officium *Cuſtadis Brevium & Rotulorum*, viz. Capitalis Clerici, quod quidem offic. pertinet etiam ad donationem Regis. D. 176. a. pl. 28. cites Hill. 1 H. 6. Rot. 1.

8. *The Maſter or Dean may make to himſelf a Bailiff, and aſſign to him an Auditor, to make him account before, and he may make acquittance to him, and he may take offerings, and make ſteward, receivers, and ſuch officers; and all theſe are good during his life.* Per Brudnell, Br. Corporations, pl. 34. cites 14 H. 8. 2. 29.

9. The office of *Exigenter of London &c.* became void by death of the officer. Afterwards *the Chief Juſtice died*; the Queen Mary granted the office of *Exigenter* to C. by patent, and afterwards by patent of the ſame date granted the office of *Chief Juſtice* to B. who was ſworn into his office, and reſuſed C. and admitted S. Upon a ſuit between C. and S. before certain commiſſioners appointed by the Queen; S. demurr'd to the juriſdiction &c. whereupon they committed him to the Fleet; but the Court of C. B. granted a corpus cum cauſa to the Warden of the Fleet, he being a neceſſary member of the Court. D. 175. a. pl. 25. Mich. 1 & 2 Eliz, Scrog v. Coleſhill.

4 Rep. 33. a. S. C. cited in MITTON'S Caſe, and ſaid there, that the grant of the Queen was held void, becauſe it was incident to the office of Ch. J. of C. B. which

the Queen cannot have, and the next Ch. J. ſhall avoid it.

10. The *Juſtices of aſſiſe* appoint the *Clerk of the aſſiſes*. The Sheriff appoints the \* *gaoler* and † *county clerk*. The *Cuſtos Rotulorum* appoints the ‡ *clerk of the peace*. Jenk. 216. pl. 59.

\* See 14 E. 3. cap. 10. and 4 Rep. 34. a. MITTON'S Caſe.

—† The King cannot make the ſhire or county clerk (who is to enter all judgments and proceedings in the county court) for the making him belongs to the Sheriff by the common law. 2 Inſt. 425. cites 4 Rep. 32. MITTON'S Caſe.—And it would be very dangerous to the ſheriffs, ſhould others be appointed to keep the entries and rolls; for ſhould the records be imbezelled, the ſheriff muſt answer for them as immediate officer to the Court. And the ſame law of the ſheriff's tourn. 4 Rep. 33. b. Paſch. 26 Eliz. MITTON'S Caſe.—‡ See Clerk of the Peace.

11. *Curfitors* are appointed by the Lord Chancellor. The *Exigents* and *Philizers* by the Ch. J. of C. B. Jenk. 216. pl. 59.

It was afterwards argued, that this was an office of trust

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reposed in the Corporation for the public good, and that the office itself is not vested in the Mayor; and therefore he cannot grant

it, tho' he may make a deputy to execute it; because the master shall be answerable for his acts, and cited 29 H. 6. Dyer 238. that a Mayor of a town may make a deputy; but he cannot grant this office, or make a revenue of it. Roll Ch. J. said it was considerable, in regard it was an office of trust, whether it may be leas'd out, altho' he may make a deputy; and therefore ordered it to be argued again the next Term. Ibid.

12. In covenant brought by the Mayor and Commonalty of London for rent reserved by them on a lease of the Garbler's office the defendant pleaded that it was an office of trust reposed in the City, and could not be leas'd for years. Hale contra; because the Mayor &c. have a fee-simple in the office by their charter, and not a meer trust reposed in them to execute it. But if it could not be granted, here is no forfeiture; for this lease shall be accounted but a deputation, and not a granting over of the office. And Roll Ch. J. said that without doubt the Mayor may make a deputy to execute this office; but he has a fee-simple, and therefore may make a lease of it, and the lessee's covenant will bind him to pay the rent. Judgment for the plaintiff, Nisi &c. Sty. 357. Mich. 1652. Mayor and Commonalty of London v. Hatton.

### (B) By what Words.

Where a patent purported only the grant of an office, and not words

of creation of the office, as *Constituimus officii* &c. the plaintiff was nonsuited in a life for such office, because he could not prove it was an ancient office. 2 Brownl. 328. Pasch. 8 Jac. C. B. Cosar v. Bull.

[1. THE King cannot create an office without words of creation, as *Constituimus* J. S. &c. But *Concessimus* such office to J. S. is not good without the said words, 21 E. 4. 79. 8 E. 4. B. 9 E. 4. 11.]

2. Appointing an officer in other manner than the law directs, as nominating a Clerk of the Peace since 1 W. & M. to hold during pleasure, instead of *quamdiu se bene gesserit*, is no execution of his authority, and the nominee has no title. 4 Mod. 295. Trin. 6 W. & M. B. R. The King and Queen v. Owen.

3. When the King grants what is rather an employment than an office, as office of Searcher for the Customs, the word *assignavimus* is the most proper word. Carth. 352. The King v. Kemp.

(C) To what Persons Offices may be granted, [pl. 6, 7, 8, &c.—And How. Jointly, pl. 1, 2, 3, 4, 5. And see (C. 2).]

[1. GRANT of the office of the *Chief Protbonotary of Bank* to two is void. 18 E. 4. 7. b.]

[2. Grant to two to be *Chief Justice* in any Bench is void. 18 E. 4. 7. b. 11 Rep. 3. b. Curle's Case.]

[3. But a grant to two to be Clerk of the Crown is good. 11 Rep. 3. b. Curle's Case.]

[4. So a grant to two to be Clerk of the Crown in the Chancery is good. \* 9 E. 4. 1. 11 Rep. 3. b. Curle's Case.]

\* S. C. cited  
2 Jo. 127.  
Hill. 31

Car. 2. B. R. in Case of Howard v. Wood.

[5. A grant to two to be an officer of the Auditor of the wards is good; \* yet it is but one office and partly judicial. But this is by the statute of 32 & 33 H. 8. 11 Rep. 3. Auditor Curle's Case.]

\* Fol. 153.

[6. An infant is not capable of the office of Steward of the Court of a manor, in possession or reversion. Mich. 40 & 41 El. B. R. between Scambler and Walters, which see Co. Litt. 3. b.]

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Cro. E. 636.  
S. C. But  
adjournatur.  
—J. Jones

Ibid, that SCAMBLER'S CASE, cited by Ld. Coke Co. Litt. 3. b. was adjudged contrary, viz. that an infant was capable of a stewardship in reversion. Mar. 43. Trin. 15 Car. in Case of Young v. Fowler.—A prebend was granted to an *Infant* of 3 years old, but was adjudged void; because he was not of age of discretion; but had he been so, it had been good; per Barkley J. Mar. 43. in Case of Young v. Fowler, cited Pridcaux's Case.

[7. If the office of Register of a bishop be granted to J. S. who is an infant of the age of 12 years at the time of the grant, *habendum at the death of J. D.* who is Register in possession for his life, to be exercised by him or by his deputy, and after J. D. dies, J. S. then being of the age of 39. this is a good grant, it being to be exercised by him or his deputy, and so not void at the making of it; and he being of full age when it falls to be exercised by him. Mich. 8 Car. B. R. between \* Young and Stowell, per Curiam, resolved upon a trial at Bar, for the office of the Register of Rochester. Trin. 15 Car. B. R. between Young and Fowler, (which was the same case before) adjudged, per tot. Curiam upon a special verdict:]

\* Jo. 310.  
S. C.—Cro.  
C. 279. S. C.  
—Where  
the grant of  
the office in  
reversion to  
an *infant*, is  
to exercise  
the same  
*per se vel*  
*deputatum*,  
'tis not good.  
But to exer-  
cise it *per se*  
*vel deputa-*  
*tum sufficientem*, it is good. Cro. C. 556. Young v. Fowler.—And so denied the Case of SCAMBLER v. WALTER, but with the above difference. Ibid.

[8. So if the office of registership be granted in reversion by a bishop or other person, to an infant of the age of 12 years to be exercised by him or his deputy; this is a good grant, inasmuch as he may make a deputy, tho' he be an infant, this being for his benefit. Mich. 8 Car. B. in the said Case of Young and Fowler, per Curiam resolved, and so the Court afterwards certified their opinion in Chancery to be in this case, 8 December 1632.]

Mar. 38.—  
Jo. 311.  
Young v.  
Stoel.—  
Cro. C. 279.  
S. C. but if  
he puts in  
an insuffi-  
cient deputy,  
it is a for-  
feiture of his office.

—So if he does not elect a sufficient one. Cro. C. 556. in Case of Young v. Fowler.

9. It was mov'd, whether a *bachelor of law* may be a commissary, since the statute 37 H. 8. 2. Popham said, that administration and probate of wills, was by the common law, which any might do; and the statute 37 H. 8. is in the affirmative, that doctors of the civil law may be commissaries, and therefore takes not away the liberty at common law. Cro. E. 314, 315. Hill. 36 Eliz. B. R. \* Pratt v. Stocke.

S. C. cited  
Jo. 264. in  
Case of  
Walker v.  
Lamb.—  
\* S. C. cited  
Cro. C. 279.  
and judg-  
ment ac-  
cordingly, as

to the office of Official of the Archdeaconry of Leicester, and also as to the office of Commissary of the Bishop of Lincoln, being granted to a lay-person, and not a doctor, but a bachelor only of the civil law. Cro. C. 258. Trin. 8 Car. B. R. Walker v. Lamb.

Tho' public offices as that of Constable of England, cannot be originally granted to a woman, yet they may descend to her.

10. *Custody of a castle* was granted to a woman. It was insisted that a feme cannot have such office, because it appertains to the war, and is to be executed by men only. Sed non allocatur, because it was granted to her *exercend. per se vel deputatum suum*; and it doth not appear to be a castle of war, but may be a private house. Cro. J. 17. Mich. 1 Jac. Lady Ruffel's Case.

Jenk. 236, 237. Humphry de Bohun's Case.

11. Grant of an office *of skill to an infant in presenti* is void; but if *in futuro*, and that when the office is to be exercised, he be of full age and expert, the grant is good. Jenk. 121. pl. 44. cites 5 Jac. The Bp. of Rochester's Case.

### [ 105 ] (C. 2) Joint Officers. In what Cases they may be.

Br. Grants, pl. 173. cites S. C. —Br. Joint-tenants, pl. 68. cites S. C. —Jenk. 142. pl. 93 S.P. and cites

S. C. And so if the King grants the office of *custos brevium* to two it is void.

Br. Grants, pl. 170. cites S. C. —Br. Joint-tenants, pl. 68. cites S. C.

1. IF the King grants the office of *Chief Prothonotary* to two, this is void per Cur. and the Justices may refuse to enrol it; for two cannot have the custody of the rolls; for then he may grant it to 20, and they cannot sit in the common bench. But it was said, that it was of the office of *Custos brevium*; for the other is of the gift of the Chief Justice, Br. Patents, pl. 69, cites 18 E. 4. 7.

2. So if the office of *Chief Justice* of the one Bench or the other be granted to two, the patent is void; and if they occupy by such patent, *all that is done before them is error.* Ibid.

3. The office of *Clerk of the Hamper* was granted to two, pro termino vitæ eorum & alterius eorum diutius viventium, and good. Admitted. D. 179. b. pl. 44. Pasch, 2 Eliz. Kempe v. Hales.

D. 285. b. pl. 39 Trin. 11 Eliz. Humphrey de Bohun's Case.

4. An office of inheritance, to which a judicature is annexed, as the office of *Constable of England* descended to two daughters, they may exercise it by deputy. Jenk. 236, 237. pl. 14.

\*Ibid. cites the Case of Ailife of SWEYEN- DEN and

5. The *Stewardship of a Court-Leet and Baron* is grantable to two. \* 2 Jo. 127. Hill. 31 & 32 Car. 2. B. R. Howard v. Wood.

BAGOT. 9 E. 4. 1. for the office of *Clerk of the Crown in Chancery*; and though in the Case of WALKER v. LAMB. Cro. Car. [258] it was doubted whether the grant of the office of *Register* to two was good, yet this was only upon the restriction of the statute of 1 Eliz. of grants by bishops, and not at common law.

A judicial office may be granted to two, as well as a ministerial one; and

6. The office of *Vicar General* was granted by the bishop of L. to A. and B. *habend. conjunctim & divisim exercend. per se vel sufficientem deputatum.* It was objected, that a judicial office could not be granted to two; for if they differ, nothing can be done; but it was answered, that the same may be said of four Judges,

as in B. R. and in ministerial officers, as two sheriffs; and the Court held the grant good. 2 Salk. 465. Mich. 3 W. & M. B. R. Jones v. Pugh. no inconvenience more in the one case than in the other.

If there be two Chancellors, and they differ, the Bishop may sit himself, and their authority ceases. 12 Mod. 10. S. C. by name of Jones v. Beau.

7. Grant of an office of Chancellor of a diocese to two *conjunctim & divisim* was held good, because of the long and constant usage. Carth. 3 W. & M. B. R. Jones v. Bew.

8. A grant of the office of Official to two and the longest liver is good by usage. Show. 288. Mich. 3 W. & M. Jones v. Bean. Carth. 213. Jones v. Bew. S. C. — 12 Mod. 10. S. C.

### (C. 3) How Joint Officers are considered in Law.

1. Sheriffs of London are as two in London, but in Middlesex are but as one. 2 Show. 433. Pasch. 1 Jac. 2. B. R. Raymond & al. v. Barber. If process be directed to the sheriffs of London, and one dies,

the process is gone, because one cannot act without the other; for they both make but one sheriff. 8 Mod. 304. in the Case of Salter v. Grosvenor. — He must wait till another is made; usage makes that; per Cur. Show. 289. 2 Show. 286. Mich. 3 W. & M. in Case of [ 106 ] Jones v. Bean. — Pasch. 35 Car. 2. B. R. Rich v. Player.

2. Where two sheriffs are, and one is challenged, the venire shall be directed to the other; so of coroners. Show. 329. Mich. 3 W. & M. The King v. Warrington. Carth. 214. S. C. — 4 Mod. 65. 1 Salk. 144.

3. Two bailiffs of a corporation make but one officer, and the one cannot act without the other; therefore if a lease to one of them is made by the corporation, he is both lessor and lessee, which cannot be. 8 Mod. 304. Trin. 10 Geo. Salter v. Grosvenor.

### (C. 4) Joint Officers. What one may do alone.

1. Process directed to the coroners to serve ought to be served by all the coroners; but where they are to give judgment, the judgment of two of them suffices, where they are four; for in the one case they are judges, and in the other but ministers. Br. Process, pl. 172. cites 14 H. 4. 34. But it was agreed, that redisseisin may be served by two coroners; for the statute says,

Coronatores pluraliter, and does not say, Omnes Coronatores. Br. Return de Briefs, pl. 60 cites 39 H. 6. 40. — Br. Process, pl. 90. cites S. C. — But the statute is, that appeal shall be commenced in full county before the sheriff and the coroner, and there if the one be absent, the other can do nothing; for it is a joint authority. Br. Return de Briefs, pl. 66. cites 39 H. 6. 40.

But where process comes to the coroners, or to the sheriffs of London, where there are two, there either coroner or sheriff may arrest the party, or serve the process; but this shall be in the name of all, and the act of all, and the return shall be in the name of all the coroners or sheriffs of London, or otherwise ill, and so it is put in use at this day. Br. Return de Briefs, pl. 66. cites 39 H. 6. 40. — Br. Process, pl. 90. cites S. C. — And it was agreed per Cur. that where it is returned by one coroner only, because the others are dead, or because there is only one there by the assize, the return is not good unless it be expressed in the return, that the others are dead, or that there is only one in this county by ancient custom; and so the fact that it is admitted, that if three coroners die, the fourth may serve the process before more coroners are elected. Ibid.

If two coroners be, and one makes a *return*, the same is good; but if the *other denies it*, then it is void. Godb. 439. cites 14 H. 4.

Coroners as ministers must all join, but as judges they may divide. Hob. 70. in Case of Lamb v. Wiseman.

*But Justices of assize have joint power, therefore the one cannot do any thing without the other without writ of Si non omnes. Br. Return de Briefs, pl. 66. cites 39 H. 6. 40.*

2. The *Justices of Peace* have joint power, and yet one of them may make process upon the statute of labourers, and arrest a man for surety of the peace, and make precept in the name of the one alone, and superedeas likewise; per Nott; and per Laicon, the *commission of the peace is joint and several*; and it is a true saying, for at this day it is such, Rex talib. &c. salut. Sciatis quod assignavimus vos conjunctim & divisim ad pacem nostram ac ad stat. &c. custodiend' &c. Br. Return de Briefs, pl. 66. cites 39 H. 6. 40.

3. Where one office is granted to two, though the King may constitute one at one time, and another at another time by several patents, yet *he that is first constituted has no judicial voice till the other be constituted*; as in case of Auditor of the Court of Wards, where it was provided by statute, that two persons should be one officer. 11 Rep. 4. Hill. 7 Jac. B. R. Auditor Curle's Case.

4. Where *two persons are constituted one officer, habend. to them, & eorum alterius diutius vivent &c.* If one of them dies, the survivor shall remain one of the persons &c. and the King may add another to him, but *till another be added his voice is suspended*; as in the Case of 14 H. 4. 35. a. If writ issues to the *sheriffs of London*, and one of them dies, the other cannot execute the writ; because his power is suspended till he has a companion chosen to him. 11 Rep. 4. b. Hill. 7 Jac. B. R. The 5th Resolution in Auditor Curle's Case.

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5. Office of *Stewardship* granted to two, one of them cannot hold Court alone; per Anderfon. Goldsb. 2. pl. 4.—Admission by one of them is sufficient. Vent. 320. cites Mo.

### (C. 5) Joint Officers. Forfeitures &c. by one.

*Contra it seems where the one is attainted of treason or felony, and they have the office for term of life; for this*

1. **WHERE** there are two *joint bailiffs, the receipt of the one is the receipt of the other*; and therefore it seems that the forfeiture of the one is the forfeiture of the other; for both are one and the same officer, and the office is entire; and this seems to be by falsity in the office, or non \* user or misuser in it. Br. Office & Off. pl. 51. cites 1 E. 3. 3.

forfeiture is not for misuser of the office. Ibid.—\* Orig. (seysmer ou misseyser.)

*If one sheriff suffer an escape both are liable; so for a*

2. Where there are joint officers a *breach of trust in one* is so in all; per Holt Ch. J. Show. 105. in Case of Boson v. Sandford.

false return by one coroner, all the coroners are liable; but where process was directed to six coroners to arrest a person, and the process was delivered to one of them, with whom the party to be arrested

stated was then present, in such case, for not arresting the party, the action ought to be brought against that coroner only; for that was a *personal tort*, which could not have been charged on the rest. 2 Mod. 33.—*Freem. Rep.* 191. Pasch. 1675. C. B. S. C. Naylor v. Sharples & al. Coroners of Lancashire.

(C. 6) Joint Office. *Determined by Surrender of one.*

1. KING H. 8. granted the office of *Clerk of the Hamper* to A. and B. for their lives, and the life of the longer liver of them, and two patents of the same form and state were made of the said grant, and one was called a duplicate, and the word *duplicate* was wrote a little above the seal of that in A's c. *study*, and the principal patent was wrote thus, viz. *Per warrantiam de privato sigillo auctoritate parliamenti*, and this remained with B. and was surrendered, and cancelled by B. while A. was in Germany; but there was no cancellation or vacate of the inelment. Queen Mary reciting the first patent and surrender, and cancelling, made a new grant to B. and C. of the same office. It was the opinion of several, that when the original patent is cancell'd, the force of the duplicate is gone in law; for no title can be made by it; because it was sealed and granted by the Chancellor at his pleasure, and without any warrant of the King to do it. D. 179. b. pl. 44. Pasch. 2 Eliz. *Kemp v. Hales.*

In this case A. just before his going beyond sea, signed and sealed a *blank parchment*, upon which a brother of A. in A's absence, wrote a formal release made in the name of A. to the said B. before the surrender mentioned, of all A's interest in the or any thing

office and patent. *Ibid.* [But of this no further notice was taken in the said Case, said to or upon it.]

(C. 7) Joint Office. *Determined by the Death of one.*

1. THE office of *Auditor* was granted to two for term of their lives, without saying (and to the survivor) by the death of one the office determines. Hill. 7 Jac. 11 Rep. 3. b. Auditor Curle's Case.

2 Wms's Rep. 108. S. C. cited [108] per Lord Maccles-

field—S. C. cited, and S. P. agreed by the Court, and by the counsel of the other side, 2 Mod. 360. Trin. 29 Car. 2. in Scacc. *ARRIS and ARRIS v. STUKELY*, which was a grant of the office of *Comptroller of the Customs* in the port of Exeter.—S. P. As to grants to two in general; but that it is otherwise if granted to two and the survivor of them. 2 Salk. 465. Mich. 3 W. & M. B. R. in Case of Jones v. Fugh.

2 Mod. 360. Trin. 29 Car. 2. in Scacc. *ARRIS and ARRIS v. STUKELY*, which was a grant of the office of *Comptroller of the Customs* in the port of Exeter.—S. P. As to grants to two in general; but that it is otherwise if granted to two and the survivor of them. 2 Salk. 465. Mich. 3 W. & M. B. R. in Case of Jones v. Fugh.

(C. 8) Joint Officers. *Pleadings by or against them.*

1. OFFICE of the Register of Admiralty was granted to two, one dies, and the survivor upon a disturbance brought *affise*; but because the *plaintiff* could not prove a grant to two of the said office, but only to one, the writ of *affise* was abated. Bendl. 53. *Hunt v. Elefdon.*—And see the Pleadings there.

D. 149. a. pl. 81. Trin. 3 & 4 P. & M.—152. b. pl. 9. Mich. 4 & 5 P. & M. S. C. And

great doubt was upon the words *quælibet persona* in the prescription, whether it should be taken in the singular or in the plural number, and collectively.

(D) *To what Persons for a collateral Respect [an Office] may be granted. Want of Knowledge.*

11 Rep. 87. [1.] If an office, either of the grant of the King, or of a common person, which concerns the administration, proceeding, or execution of justice, or the revenue of the king or the commonwealth, the interest, benefit, or safety of the subject, or such like, if those, or any of them are granted to a man who is not expert, or who has no skill or knowledge to exercise or execute it, the grant is merely void. Co. Litt. 3. b.]

D. 176.—  
Hob. 148.  
An unskilful person, after two days respite, and admonition of his want of skill, was admitted to the office of *First Remembrancer of the Exchequer*, the Court telling him they had many precedents of denying admission to such officers for want of skill, and that not having experience himself, he must find an able deputy. Hard. 130. Mich. 1658. in Scacc. Dorrington's Case.

S. P. by several of the Justices, and for proof thereof a copy of the record was produced, and is there entered of WINTER's Case. 2 And. 118. pl. 63.

2. Where the King grants an office to one who does not know how to exercise it, the patent and grant is void; per Billing Justice. Br. Office & Off. pl. 16. cites 9 E. 4, 5.

Br. Patents, pl. 108. cites S. C. —  
11 Rep. 87. —Hob. 148.—The precedent of the case here cited is in D. 150. b. pl. 1. Mich. 4 & 5 P. & M. at which time Brook Ch. [109] J. of C. B. revok'd a grant made by him of the office of chief protonotary to his wife's brother, and gave it to one Whiteley.—Hobert Ch. J. cites S. C. and says, that an office of learning given to a man utterly insufficient is utterly void; and that though it be to him and his assigns, or to be exercised by his sufficient deputy, it mends not the case; but it must radically vest in the first grantee before it can go in title of procurator or deputation to any other. Hob. 148. in Case of Colt and Glover v. Bishop of Coventry and Lichfield.

3. The King made Thomas Vinter Clerk of the Crown by his letters patents, and the Justices of B. R. with the assent of the Justices of C. B. refused him, because he was not exercised in this office, nor any other in this Court as he ought by a long time, and so declared to the King, by which the King, by the advice of the Justices, appointed one John West Clerk there who was expert, and sent to the said Justices his letters under his signet, which after were inrolled in the same Court, that they rejected Vinter, and admitted the said West, which was done accordingly, in as much as Vinter was insufficient to serve the King and the people; and so see that the letters of the King under the signet are sufficient &c. And the abstract of this inrolment was shewn to me in writing by my companion Sir James Dyer Justice of the Common Pleas in Mich. Term 5 Mary we then sitting in our places upon the High Bench in C. B. at Westminster &c. Br. Office & Off. pl. 48. cites Mich. 5 E. 4. Rotulo 66. in B. R. Vinter's Case.

Litt. R. 22. 4. A clergyman was made Chancellor to a Bishop, and confirmed by S. C. — the dean and chapter, but because he was not learned in the canon and civil laws he was removed; and though it was insisted that he had a freehold, and therefore had prayed a prohibition, yet it was denied. Cro. C. 65. Hill. 2. Car. C. B. Sutton's Case.

Nov. 91.  
Pasch. 3.  
Car. S. C.  
—Godb.  
370. S. C.  
—Lat. 228.  
S. C.—Palm. 450. S. C. by name of GLANVILLE's Case, [which seems to be a mistake, and that that name is mentioned only because GLANVILLE moved it for a prohibition.]

5. A grant of the office of *Herald at Arms* was made to B. for life, and the Earl Marshal suspended him from the execution of his office, because he was ignorant in his profession; and it was the opinion of the Justices, that because he *was ignorant in such his office of skill, he had no freehold* in the office. Godb. 391. in *Sutton's Case*, cites *Brook's Case*. Lat. 229. cites S. C. —Palm. 451. cites S. C.

6. If the King gives an office in B. R., the Court may remove the party for insufficiency. Lat. 229. Mich. 3 Car. in *Doctor Sutton's Case*.

### (E) What Estate may be granted of an Office.

[1. *LEASE* for years of the *Marshalsea* in the King's Bench is not good; because it is office of great trust, and by such lease it may come to the executor, administrator, or ordinary, who will be in without the allowance of the Court. Ergo. 9 Rep. 97. Sir Geo. Reynell's Case. Contra 39 H. 6. 34.]

Lease for years determinable on life of Marshal's office held good. 6 Mod. 57.

Mich. 2 Annæ. B. R. *Sutton's Case* — Hard. 357. Contra. Jo. 463. — Cro. C. 587. Mich. 16 Car. B. R. *Mead v. Reynell*. S. C.

By the same reason it could not be granted for years, it was not grantable in fee; for there is the same inconvenience; per Nicholas J. Hard. 49. Hill. 1655. in Scacc. in *Case of Jones v. Clerk*. — Before Sir G. Reynold's Case the law was taken otherwise; per Hale Ch. B. Hard. 357. in *Case of Veale v. Prior* — It was said, Arg. that Hale Ch. B. denied Sir G. Reynold's Case to be law, and said, that the true reason of it was the custom of its being granted in fee; and Lord Finch said, he was of Hale's opinion, that an office may be granted for years. 2 Show. 171. Mich. 33 Car. 2. B. R. in *Case of Prodders v. Fraiser*.

[2. The King having the office of *Marshalsea* in ward, grants it for life, or *durante minoritate*, it is void. 9 Rep. 97. Sir Geo. Reynell's Case. Contra 5 E. 4. 3. per Danby.]

[3. The *Duke of Norfolk*, tenant in tail in capite of the office of the *Marshalsea* died, his heir within age, the King has a chattel in the office, viz. during his minority. If the King dies, this shall descend to the next King, and shall not go to his executor. 9 Rep. 97. Reynell's Case.]

[4. The King having the said office in ward, granted it to Winfield at will, it is good. 5 E. 4. 3. 9 Rep. 97. Reynell's Case.]

S. P. But per Markham, the grant is void, because it

was made before office found; but Danby contra; that the will of the King appears, which is sufficient without patent; and so it seems, that if the grant had been for any term certain, it is not good if it be before office found. Br. Patents, pl. 59 cites 5 E. 4. 3.

[5. The King may grant the custody of a gnat in fee. 9 Rep. [110] 97.]

[6. So to be Sheriff of a county in fee. 9 Rep. 97. b.]

7. 14 R. 2. cap. 10. enacts, 'That no customs, comptroller, searcher, weigher or finder shall have any such office for term of life, but only during the King's pleasure, notwithstanding any patent or grant to the contrary.'

8. 17 R. 2. cap. 5. enacts, 'That no searcher, gauger, almsgiver, finder, or weigher of wools, or other merchandize, collector of customs,

and subsidies, or comptroller, shall have their several offices for term of life or years; but such offices shall remain in the King's hand, under the governance of the treasurer, with the assent of the council, if need be; and all charters and patents otherwise made shall be void.

9. *Usher of the Exchequer* was granted in fee: and there is no question but a *judicial office* may be granted to one and his heirs. Mar. 43. per Barkley J. Trin. 15 Car. in Case of Young v. Fowler.

10. The office of *Warden of the Fleet*, which is an office of great trust, is granted in fee. Per Barkley J. Mar. 43. in Case of Young v. Fowler.

11. *Registership of policies of assurance*, is grantable for years. Hard. 351. Hill. 15 & 16 Car. 2. in Scacc. Veale v. Prior.

### (E. 2) Estate therein. Continuance of Estate imply'd by Law, or given by the Words. How long.

1. THE office of a *Town-clerk* is in the nature of it in the eye of the law an office for life, and will be so intended till the contrary appear. 10 Mod. 147. in Case of the Queen and Corporation of Durham, cites Vent. 82.

2. And tho' the charter is that he shall be *annuatim eligibilis*, he may continue town-clerk, and will so do until they choose another. 10 Mod. 147. Queen and Corporation of Durham.

3. But if the charter is *eligibilis pro uno anno tantum*, his office will expire at the end of the year, whether they choose another or not. 10 Mod. 147. Queen and Corporation of Durham.

Fol. 154.

### (F) At what Time it may be granted.

8 Rep. 55. b. [1. AN office ministerial may be granted in reversion. 11  
—Jo. 311. Rep. 4. Auditor Curle's Case.]

Young v. [2. But an office judicial cannot be granted in reversion. 11  
Stowell. Rep. 4. Curle's Case.]

Jenk. 141.

pl. 29. — Not by present words, but by words de futuro, such office may by the King. Hob. 150, 151. —

Jenk. 183. pl. 14. — 8 Rep. 55. a. Countess of Rutland's Case.

By usage and custom a judicial office may be granted in reversion. Hard. 357. Hill. 15 & 16 Car. 2. in Scacc. in Case of Veal v. Priour. — Per Hale Ch. Baron. 2 Vent. 188. S. P.

[3. As the office of *Master of the wards*, or *surveyor* or *attorney* cannot be granted. 11 Rep. 4.]

This office of Auditor could not be exercised by deputy; but [4. An office partly ministerial, and partly judicial cannot be granted in reversion, as the office of the *Auditor of the wards*. 11 Rep. 4. Auditor Curle's Case.]

where personal attendance is not requisite, but a deputy may be made, it may be granted in reversion. 2 Show. 21. Mich. 30 Car. 2. B. R. Howard v. Wood.

[ 111 ] The trustees of the King being his lessees, granted to A. and B. the *Stewardship of the Honour of Pontefract*, and the custody of court leets and court barons within the borough, with the perquisites, habendum to them (after a prior grant determin'd), for 30 years, if the grantees,

*grantee, or either of them should so long live.* It was objected that this is a judicial office, and therefore not grantable in reversion, according to D. 259. Sir JOHN SAVAGE's Case, and Co. Litt. 3. h. And that tho' it be partly ministerial, as for the court baron, yet as to the court leet it is judicial, and being one *intire office*, cannot be granted in reversion, according to 11 Rep. Auditor CURLE's Case. But resolved that the grant is good in this case of the reversion; for here the *grant is not of the stewardship only, but expressly of the custody of the courts leet and baron.* And tho' it might not be good for the leet, yet as to the court baron it is good without doubt. And for this point cites the Case of YOUNG v. STOLL, and of YOUNG v. FOWLER. And that there is a great difference between one *intire office*, comprehending two parts, one judicial, and another ministerial, as the office of the Auditor of the Court of Wards, whereof the judicial cannot be granted to one, and the ministerial to another, and two offices distinct in themselves, but comprehended under one common name, as steward, comprehending the offices of steward of court leet and court baron; that it cannot be denied but that the one office may be granted to one, and the other to another. 2 Jo. 126. Hill. 31 & 32 Car. 2. B. R. Howard v. Wood.—2 Mod. 173. S. C. Hill. 28 & 29 Car. 2. in the Dutchy Court; but this went off upon another point.—Freem. Rep. 473, 478. S. C. argued, but no judgment.—2 Lev. 245. Hill. 30 & 31 Car. 2. B. R. S. C. that upon arguments at the bar, the Court was of opinion that the grant to the plaintiff for years, and in reversion, was void as to the court leet's being a judicial office, but good as to the courts baron: but upon the importunity of Jones attorney-general to be further heard, adjournatur.—The Court took this to be different from Sir GEORGE REYNOLD's Case, in 9 Rep. because that was a lease for years absolutely, which carries it to executors and administrators, and so perhaps to persons unable; for if it had been to J. S. for 99 years, if J. N. should so long live, that then that had been nought; but the case in question is not so, and therefore the reasons of REYNOLD's Case do not reach this. Farther, the Court took a great difference between the place of Judges here in a Court of Record, and Stewards, who inter alia have the keeping of a Court of Record; the former must be personally attendant, the latter may exercise the office by deputy; so Auditor CURLE's Case must be understood secundum subjectam materiam, an Auditor's place, which is an office very great, and can't be exercised by deputy. And so it is of an office partly judicial and partly ministerial; if personal attendance be requisite, and where a deputy can't be made, there the reversion can't be granted; but this office may, and usually is exercised by deputy; for several noblemen have the stewardship of courts belonging to several bishops, and they exercise them by deputy; and this was agreed upon by the whole Court; and judgment for the plaintiff. And the reporter adds a note, and says, these reversionary grants are of late invention, being first introduced temp. Jac. 1. and are contrary to the rule and reason of the common law, nemo enim potest dare id quod non habet &c. 2 Show. 24, 25. Mich. 30 Car. 2. B. R. Howard v. Wood.

[5. A bishop may grant the office of the Register of his court to another, *habendum after the death of J. S.* (who has it for his life by a first grant) and this is a good grant without recital of the first estate. Mich. 8 Car. B. R. between Young and Stowell, per Curiam, resolv'd upon a trial at bar for the office of Register of Rochester. Hil. 10 Car. B. R. between Young and Fowler, resolved per Curiam, upon trial at bar for the same registership.]

Jo. 310.  
S. C.—  
Cro. C. 279.  
S. C.—  
4 Mod. 279.  
3 Le. 30.—  
Hard. 357.  
—Register  
of Arch-  
deacon is  
grantable in

reversion, being warranted by usage. 2 Vent. 188. Trin. 2 W. & M. C. B. Woodward v. Fox cites Cro. C. Young v. Stoll.

6. Where the officer of fee grants the office of Marshal of B. R. as aforesaid to J. B. for life, the grantor can't grant to the said J. B. who was officer for life to make a deputy, for 'tis void; and yet the misuser of such void deputy is a forfeiture of the office of the tenant for life here; quod nota. Br. Forfeiture, pl. 27. cites 39 H. 6. 32. per Cur.

7. The King may grant an office for life, and by another patent he may recite the first grant, and grant it to another after the death of the first, and well. But it seems he cannot grant it by name of reversion; for there is no reversion of an office, because it determines after the death of the grantee; yet he may grant it by name of office habend. post mortem of the first patentee. Br. Corodie or presentment, to a church the King can't grant in reversion, 8 Rep. 55. b. in the

*Earl of Rutland's* Patents, pl. 30. cites 36 H. 6. 48. per Laicon.—But it should be 39 H. 6. 48.

CASE, Mich.

6 Jac. cites

39 H. 6. 48.—For in those and other like cases, the King has only a presentment or commendation of a person when the corody or church is void, and not before. Per omnes J. ibi. — He ought to *recite* that such a one has such an office for life, and then to grant the office aforesaid, habendum post mortem &c. But if there be no such special recital, the second grant is void, 8 Rep. 55. b.

[ 112 — Arg. cites ‡ 3 H. 7. last Case. ‡ 6 H. 7. 14. ¶ 8 H. 7. 12. b. — Br. Patents, pl. 5. cites 3 H. 7. 16. — ‡ Br. Patents, pl. 54. cites S. C. — ¶ Br. Patents, pl. 57. cites S. C. —

There is not any fee or reversion of offices, but only a nomination which the party has to name any he pleases when the office shall become void. Per Dyer, 3 Le. 31. Mich. 15 Eliz. C. B. Anon.

Cro. C. 279.

Mich. 8

Car. B. R.

where it was

mov'd that

the rever-

sion of an

office can-

not be grant-

ed by a com-

mon person,

it was agreed

per Cur.

that it can-

not be grant-

ed as a re-

version, and

by the name of a reversion; for there is no reversion of an office, unless it be an office of inheritance, and then it may well be granted in reversion, *habendum after the death of the grantee for life*; the second point in the Case of Young v. Smel. — S. P. of the stewardship of a manor in reversion.

D. 219. Sir John Savage's Case. — D. 20. b. Marg. 56. — Carth. 152. Trin. 7 W. 3. B. R. in Case of King v. Kemp, says, that a distinction has been taken between a grant of a reversion and a grant to commence in futuro. Vide D. 270. — The King may grant an office to commence in futuro,

or upon a contingency, which shall arise out of the inheritance he hath in the office itself, for such he may have in point of interest, tho' not in execution; and judgment accordingly. 4 Mod. 280,

281. Pasch. 6 W. & M. B. R. S. C.

8. A granted the *Stewardship of his manor to J. S. for life.*

J. S. was seized, and afterwards by deed reciting the said grant,

and that J. S. had the said office for his life, A. by name of the re-

version, granted the reversion of the said office to W. R. The Court

held the second grant by name of reversion void; for there was

no reversion thereof in any person, and also none can be steward

but one only, viz he that exercises the office: and tho' the

grant had been *de officio suo*, and had not been (*de reversione*

*officii*) in the Case of a common person, and [it had been *ha-*

*bendum officium illud post mortem J. S.* it is not good; but in the

*King's Case* it is otherwise. Quære. D. 259. pl. 18. Pasch. 9

Eliz. Sir John Savage's Case.

9. By virtue of an act of parliament made the first of Queen

Mary, the Court of Augmentations was dissolv'd, and united to the

Exchequer, and all records and books of the Court so dissolv'd,

wherein the leases and warrants for making them were enroled,

and all accounts of her issues and revenues were ordered to be

and remain with the Clerk of the Pipe in the Exchequer. King

Ed. 6. granted the office of Ingrosser of the great rolls of the

Exchequer, or the Clerk of the Pipe, to one Christopher Smith, for

life; Queen Eliz. anno 20 of her reign, granted this office to

one Morrison, after the determination of the grant to Smith; and

afterwards, anno 30th of her reign, reciting the grant to Smith,

and her grant to Morrison, she farther granted to Woolley the

office of Clerk of the Pipe, and of the Engrosser of the patents

of dimissions and offices; and also, the Keeper of the accounts,

enrolments and records, of the late Court of Augmentations,

&c. *habendum* to the said Woolley for life, after the determina-

tion of the grants to Smith and Morrison; afterwards Smith died,

and tho' Morrison was then living, yet upon Smith's death

Woolley possessed himself of all the records; and it was ruled,

that Morrison might enter the house where the records were

kept,

kept, and take them from Woolley. Moor 289. Pasch. 32 Eliz. Morrison's Case.

10. The office of *Official of an archdeacon*, and of a *Commissary of a bishop* are within the words and intent of the statutes of 1 Eliz. and 13 Eliz. for they are *hereditaments*, and are pertaining unto them; and that a grant of those offices to two, where they were only grantable to one for life, and being granted in reversion, is a void grant by those statutes against the successors; for they restrain all grants but those of necessity, as well of offices as other things not warranted by those statutes. Cro. C. 259. Trin. 8. Car. B. R. Walker v. Lamb.

11. The *Chief Cryer of this Court* hath his office by patent from the King; and this office may be granted in *reversion*. Pasch. 23 Car. B. R. for this is the King's own proper Court, where himself used to sit in person, and it is for his honour to have such officer by patent; and it may be granted in reversion, because it is but a ministerial place. 2 L. P. R. 256, 257.

12. *Master of an hospital, prebendary, donative*, are not grantable in reversion. Mich. 23. Car. 2. 1 Chan. Cases 215. [ 113 ]

13. *Masterhip of St. Catherine's Hospital* is not grantable in reversion. 1 Jo. 177. Mich. 33 Car. 2. B. R. Lessee of Lord Brunker v. Sir Robert Atkins.

14. The King may grant estate in an office to commence in *future, or upon contingency*. 4 Mod. 280. Pasch. 6 W. & M. B. R. The King v. Kemp.

Carth. 352.  
S. C. accordingly.  
—S. P.  
2 Brownl.

234. in Case of the Earl of Rutland v. the Earl of Shrewsbury.

(G) *How it ought to be granted [Or rather, Who shall be said to be an Officer, and from what Time.]*

[1.] If the King grant to another the office of a *Herald*, he is a *complete herald immediately*, before any investing with the habit and ornament. Tr. 7. Ja. B. per Curiam in Chester Beault's Case.]

2. The *Masters and Vouchers of the Chancery*, who have no other creation, but by election or admission of the Court, are not officers till they are admitted and sworn by the Court. Per Pigot. Br. Office and Off. pl. 16. cites 9 E. 4. 5.

But he who has an office of the grant of the King is an officer immediately

without being admitted or sworn by the Court. Quod nota bene. Ibid. — S. P. 2 Mod. 263. Agis v. Strakey.

3. He who has grant of an office in a Court is *not officer till he be admitted* by the Court, as in the Exchequer, Common Pleas &c. Per Vavisor; quod non negatur; quære inde. Br. Office and Off. pl. 28. cites 11 E. 4. 1.

S. P. Per Cur. Br. Office and Off. pl. 45. cites S. C.

4. The *constituting a new office* or officer may be good without an annual or casual fee being first annexed to it. Mo. 809. Pasch. 6 Jac. Bishop of Sarum's Case.

5. The

5. The Clerks bred up in the *custos brevium's* office, *crown* office, or *prothonotarie's* office in C. B. ought of right to succeed each other according to their ancienty, and they cannot be turn'd out without cause, altho' the chief officer be responsible; and any employment out of which one cannot be turn'd without cause (as that of transcribing records in the *custos brevium's* office) may be called an office. Keb. 689. Pasch. 16 Car. 2. Humphreys v. Paget.

6. A man cannot have an office at will without deed. Per Powell J. 2 Salk. 536. Hill. 10 Ann. B. R. Gatton v. Milwich.

See Sheriff.

## (G. 2) What Things he may do.

1. WHERE the law gives a *distress* for the public benefit, the officer may *sell*. Thus on a *distingas* in a Court Leet for a fine as in case of nuisance where the publick is concern'd, the officer may sell of common right.—But upon a *distingas* in a Court Leet pro certo lete, the officer can't sell the distress of common right without a custom. 1 Salk. 379. Mich. 1 Annæ. B. R. The King v. Speed.

## [ 114 ] (G. 3) Officer *de Facto*; Of Acts done by an Officer, &c. *de Facto*, and in what Cases he is punishable.

Br. Forfeiture de Office, pl. 18. cites S. C.

\* 2 Hawk. Pl. C. 134. cap. 19. f. 23. & 135. f. 28.

1. HE who occupies as *Marshal* in B. R. be he officer of right or by tort, shall be charged with the escapes. Br. Escape, pl. 18. cites 39 H. 6. 33.

2. The words Sheriff, Gaoler &c. in the statute 13 E. 1. cap. 11. extends to all keepers of gaols; and therefore if one hath the keeping of a gaol by wrong or *de facto*, and \* *suffers an escape*, he is within this statute as much as he that has the keeping of it *de jure*. 2 Inst. 381, 382.

3. An action will lie against a Mayor *de facto* for a false return upon a writ of mandamus. Lutw. 519. Trin. 6 W. & M. in Case of Knight v. the Corporation of Wells.

## (G. 4) What Acts or Grants of Officers &c. *de Facto* are valid.

\* If one occupies as abbot of his own head without installation or institution, his deed

1. WHERE an *Abbot* or *Parson* is inducted erroneously, and makes a grant or obligation, and after is *deprived or deraigned for pre-contract* or such like, this shall bind, because he was an abbot or parson in possession; but a usurper who usurps before installation, or induction, or presentation, where another abbot or parson is rightfully in possession, or \* if one enters, and

and occupies in the time of vacation *without any election* or presentation, the deed of such is void. Br. Non est factum, pl. 3. cites 9 H. 6. 32.

shall not bind the house; per Cur. where none is abbot at the time, &c. Br. Abbe, pl. 19. cites S. C.

2. Acts done by an officer *de facto*, and not *de jure*, are good; as if one being created *Bishop*, the former bishop not being deprived or removed, *admits one to a benefice upon a presentation, or collates by lapse*, these are good and not avoidable. Arg. quod Curia concessit; for the *law favours acts of one in a reputed authority*, and the inferior shall never inquire if his authority be lawful. Cro. E. 699. Mich. 41 & 42 Eliz. B. R. in Case of Harris v. Jays.

S. P. Where the bishop *de facto* made a *least* which was confirmed by the dean and chapter, and after the bishop *de jure* died in

the life of the bishop *de facto*; it was resolved, that he not being lawful bishop, and this lease being to charge the possessions of the bishoprick, it is void; altho' all *judicial acts*, as admissions, institutions, certificates &c. shall be good; but not such *voluntary acts as tend to the depauperation of the successor*, and so affirmed a judgment given in B. R. in Ireland. Cro. J. 552. 554. Reuan Obrian & al. v. Kaivan.

3. If one is *elected Mayor of a Corporation without being duly qualified* according to a late charter, to be chose into that office, and after such election he *puts the seal of the corporation to a bond*, this obligation is good: for by his coming into the office by colour of an election, he was thereby mayor *de facto*, and all judicial and ministerial acts done by him are good; and tho' the corporation might have removed and displaced him, yet this not being done he had power to seal the bond. Lutw. 508, 519. Trin. 6 W. & M. Knight v. the Corporation of Wells.

(H) *What will excuse the Exercise of an Office.* [ 115 ]

[ 1. 9 Rep. 98. b. MARKE had a patent for life to be Serjeant at arms to attend the Lord Chancellor, the Queen by parol licences him not to exercise it during her will, till he be otherwise commanded by the Queen; and resolved a good licence; because the Chancellor is but deputy of the Queen at will, and therefore the service by the serjeant done to the deputy is done to the Queen herself.]

S. C. cited Mo. 193. in pl. 342. by the name of Whitney v. Steward.—In this case the Queen does not depart with

any interest, but only suspends the service for a time, and therefore such licence by parol is good enough. 9 Rep. 99. a. S. C. cited in Sir GEORGE REYNEL's Case. And see there 99. b. to the end of 103. b. the entry of the judgment at large.—S. C. cited Cro. E. 424. Mich. 37 & 38 Eliz. B. R. in Case of WHETSTONE v. HIGGARD, and says it was adjudged to be good; for her corporate body does not take away or destroy her natural body, but that she may retain servants and do other acts as a common person does.

2. A. who was *Searcher of the port of S. for life*, was absent from 10th of June to the 12th of August following, and this was by reason of his being imprisoned, and in execution for debt due to the King at the King's suit by precept out of the Exchequer. The question was, if this should excuse the forfeiture in regard of the necessity, he being committed for debt to the King, and likewise

likewise for misdemeanor in his office. The Court having conceived some doubt hereupon, and there having been several other causes of forfeiture found by the same inquisition, waved this point, and gave judgment upon the others. Cro. C. 491. Mich. 13 Car. B. R. The King v. Books.

See Constable—Steward.

(I) *What Office may make Deputy, as incident to the Office [or otherwise.]*

If Parkership be granted to an Earl

[1. A GRANTEE of office of *Parkership* may make assignee. 11 E. 4. 1.]

without words to make deputy, he may keep it by his servants. 9 Rep. 49. Trin. 8 Jac. Earl of Salop's Case.

[2. The *Esquire of the body of the King* cannot. 11 E. 4. 1.]

3. *Lord High Constable of England* died, and left two daughters his heirs; till marriage the daughters may exercise the office by deputy, and after marriage the baron of the eldest may exercise it alone. D. 285. b. Trin. 11 Eliz. pl. 39.

Jenk. 110. pl. 14. S. P. D. of Norfolk's Case. —Where

4. He that has an *office of trust* cannot make a deputy, unless it be granted to him to exercise by himself or deputy. Cro. E. 187. Trin. 32 Eliz. B. R. Watkins v. Johns. —Le. 289.

there is trust and confidence reposed in an officer, he cannot make a deputy unless empowered by express words. Hard. 352. Arg. cites Pl. C. 380. —See D. 156. b. pl. 26.

5. Per Popham, it is usual for bishops to appoint great persons to be stewards, and to appoint their under-stewards also, but it would be hard to maintain it unless they were ancient, and *distinct offices*. Cro. E. 636. Mich. 40 & 41 Eliz. B. R. Scambler v. Waters.

6. Bailiff of a liberty may have a deputy. Cro. J. 242. Pasch. 8 Jac. in Cam. Scacc. Kent v. Elwis.

S. P. Roll. R. 247. in S. C.

7. A *judicial officer* cannot make a deputy, because he is called to do justice; otherwise of a *ministerial officer*, who may make his deputy; per Doderidge J. And he said, that at the first, in the first government the *Earl* made his deputy, viz. the *sheriff*, and be also made his deputy, viz. the *under-sheriff* and his *bailiff's errants* within the county called the *serjeants of the county*, and

[ 116 ] no warrant yet to do so, but the same was still so done. 3 Bulf. 78. Mich. 13 Jac. in Case of Phelps v. Winchcomb.

\* *Injudicial* affects the sheriff cannot make a deputy, as to execute a writ of inquiry. Noy.

8. *Constable*, \* *sheriff*, † *dean*, *aldermen of London*, *chamberlain of London*, *escheator*, may make a deputy, but this is by statute, and so by statute (but not at common law) may *Justices in eire*. Roll. R. 274. Mich. 13 Jac. B. R. in Case of Phelpe v. Wincombe. —† *Mayors* may; per Coke Ch. J. 3 Bulf. 78. S. C.

21. Bandal's Case. —† *Dean* may make a substitute for matters of jurisdiction, as for correction or visitation, but not for the administration; and therefore cannot make a deputy to confirm leases, nor to make orations to give advice to the bishop. D. 145. b. Marg. pl. 65. cites R. 2. Fitzh. Grants 104. —† Court of *pipowders* to be held before a *mayor* and *two citizens* by prescription cannot be held

held before a deputy. Mo. 831. Mich. 10 Jac. B. R. Goodson v. Duffield.——Because a Judge cannot make a deputy. D. 132. b. Marg. pl. 80.

9. A deputy may be made where an office is disposed of to a person *incapable* to manage it in person. Arg. Hard. 352. Hill. 15 & 16 Car. 2. in Scacc. in Case of DEALE v. PRIOR, cites 9 Rep. the Earl of Shrewsbury's Case—and Lady Ruffell's Case. An infant may where it is exercend' per se vel per sufficientem deputatum.

Cro. C. 546. 2 Roll. a. 153. 8. Young v. Fowler.——March 43.

10. In error of a judgment in the *Palace Court* held before James Duke of Ormond, the error assigned was, that the Duke was not in the Court (it being held before his deputy according to the grant), another error being assign'd and demurr'd upon, it was touch'd in the arguing thereof, that there cannot be a *judicial place* to hold a Court by deputy; and so held Foster Ch. J. and Twisden J. But Windham J. contra, and said, that several Recorders are made to hold per se vel deputat. and so said Wyld at the bar, that he so held his place of *Recorder of London* at that time. Foster said, this is *by the custom* of London: but certainly several other Recorders hold their Courts by deputies; so does the Recorder of Northampton, who is the Earl of Manchester, and holds the Courts by his deputy Harvy at this time. And the Steward of the Borough Court of Southwark holds it by deputy. Lev. 76. Mich. 14 Car. 2. B. R. Molins v. Wetby.

11. The office of *Clerk of the Papers* cannot make a deputy; because it is not granted to him and his assigns, or to be executed per se vel deputatum suum; and besides it is a *personal service*, and requires knowledge and skill; nor can any exercise the office, but he that is admitted by the Court. Freem. Rep. 429. Trin. 1726. Woodward v. Aston.

12. An office which *concerns the King's revenue* cannot be executed by deputy; per Ld. Chancellor. Chan. Cases in Ld. Talbot's time 141. Mich. 1735. Law v. Law.

## (I. 2) Who may make Deputy by Reason of the Words.

1. **H**E who has an office to exercise by himself or his deputy &c. as of *Marshal* &c. may make a deputy; but his deputy cannot make a deputy, unless the patent be by himself or his deputy or his deputy's deputy; quod nota. Br. Patents, pl. 64. cites 10 E. 4. 14.

2. He that has an office of *trust* cannot make a deputy if it be not in his patent to exercise by himself or his sufficient deputy; contra of other offices. Br. Patents, pl. 66. cites 11 E. 4. 1. Br. Grant, pl. 99. cites S. C.—S. P. of the office, of Cham-berlain of the Exchequer, which was granted to him and his assigns; he cannot make a deputy by these words, tho' he may assign the office by virtue of them. Jenk. 141. pl. 89. cites S. C. by all the Judges in the Exchequer.

3. The King granted to H. Earl of Northampton, the *soverialty* of the county of Northampton, and the office of *sheriff* of Northampton for term\* of his life to have, occupy, and execute that office and all other offices belonging to the sheriff in the county aforesaid, by himself or his sufficient deputy, rendering therefore to the King and his heirs annually 100*l.* at his Exchequer, *without any other account* to be made thereof to the King; and it was held, that he cannot make a deputy; for the King cannot grant to a man to make an officer of record to serve the King's Court, nor to make a Justice: quære; for cities and burghes have such liberty. Br. Patents, pl. 45. cites 2 H. 7. 6.

### (I. 3) Deputy made how; without Writing.

It can't be without deed, per Walter Ch. B. Litt. R. 135.—In pleading he need not shew how

he was made deputy; per tot. Cur. præter Williams J. 2 Bulst. 251. Trin. 12 Jac. B. R. in Case of Kenicot v. Bogan.—\* For an assignee conveys an interest to himself; and must therefore shew how he was made so. Arg. 2 Bulst. 251.

Jenk. 110. pl. 14. The Duke of Norfolk's Case accordingly.

1. A Deputation is good *without deed*; for a deputy doth things only as a servant, and in right of his master, and so may be made without deed; otherwise of an\* assignee. Arg. And of that opinion was Gawdy. Cro. E. 67. Mich. 29 & 30 Eliz. B. R. Clecott v. Dennys.—cites 23 E. 3. Barr. 259. 8 R. 2. Avowry 260.

2. A deputy ought to be made *by writing*. 9 Rep. 51. b. Trin. 8 Jac. in the E. of Salop's Case.

### (K) Who may give Power to make a Deputy.

Judicial office cannot be granted by the King to any with power to make deputy. Jenk. 141. pl. 89.

[1. THE Marshal of inheritance of B. R. having power to lease it for life cannot give power to lessee to make a deputy. 39 H. 6. 34.]

(K. 2) Where a principal Officer having Power to make a Deputy, *at what Time* he may, or must do it.

1. WHERE the Duke of N. grants the office of Marshal to J. B. for life, and he is thereof seised, the Duke cannot grant to him to make a deputy; by all the Justices; Brook says, the reason seems to be, because by the first grant the grantee is officer for term of life; and therefore *if it be not granted to him in the first patent* to occupy and exercise by himself or his sufficient deputy, he cannot grant after to make a deputy; for it

was

was admitted that the Duke himself might make a deputy before his grant if he himself had exercis'd the office. And so it is done at this day. Br. Deputy, pl. 7. cites 39 H. 6. 34.

\* (K. 3) Deputy. *His Power.*

1. *DEAN* may make substitute for matter of jurisdiction, as for *correction* or *visitation*, but not for the administration. So, *not to confirm leases*. D. 145. b. pl. 65. marg.

2. *Suffragan* has like power as the bishop; but he *cannot confirm*; for he has participationem sollicitudinis, non plenitudinem potestatis. D. 145. b. pl. 65. marg.

3. All *returns* made by deputy ought to be made in the name of the principal officer, and not in his own name; per Doderidge. 3 Buls. 78. Mich. 13 Jac. in Case of Phelp v. Winchcomb.

4. A bailiff was deputed to serve process only to such a sum, and he *exceeded his stint*, and served process of a greater sum, and levy'd the money and went off with it. The Court awarded that he that deputed him should be liable. Litt. R. 33. Pasch. 2 Car. C. B. Anon.

5. What is done by the deputy is done by the principal, and it is the act of the principal, who may *displace* him at pleasure, even tho' he were constituted for life; per Holt Ch. J. 1 Salk. 18, 19. Pasch. 12 W. 3. B. R. in Case of Lane v. Cotton.—cites Hob. 13. Mo. 856.

By making deputy, the whole power of the principal is in the deputy. 6 Mod. 235.

Pasch. 3 Ann. B. R. Godolphin v. Tuder.—2 Salk. 468. S. C.—So, *leave of deputy* is leave of principal. Farr. 78. Mich. 1 Anne B. R. The Queen v. Smith.

6. The nature of deputation is to *convey all the power of the principal* without any reservation or restriction; for as he cannot enlarge his deputy's power, by giving him a greater one than he has himself; so he cannot abridge it by reserving part to himself; per Holt Ch. J. in delivering the opinion of the Court. 12 Mod. 467. Pasch. 13 W. 3. in Case of Parker v. Ket.

(K. 4) Deputy. In what *his Act* shall bind the *Principal*.

1. *TWAS* agreed, that if a man has an office, and makes a deputy who *misuses the office*, by this the grantee or inheritor of the office forfeits the office; for the deputy is sub officario, and the officer remains officer till forfeiture. Br. Forfeiture de Terres, pl. 27. cites 39 H. 6. 32.

S. P. Per Coke Ch. J. Roll. R. 275.—S. P. Per Holt J. 1 Salk. 19. cites 39 H.

6. 34.—S. P. 11 Mod. 17. per Holt Ch. J. in Case of Lane v. Cotton.—*But where an officer of fee, as here, grants the same office to another for term of life, and the grantee misuses &c. there the grantee for life forfeits his office and estate for life, but the grantor forfeits nothing; for there the grantee was officer, and so is not a deputy; and so see a diversity between deputy and assignee.* Br. Forfeiture de Terres, pl. 27. cites 39 H. 6. 32.

2. The act of the *under-sheriff* or his deputy in the name of the sheriff shall charge the sheriff, and for their act the sheriff himself shall be amerced, and no other. Br. Office & Off. pl. 24; cites L. 5 E. 4, 5.

3. A deputy *certifies falsely*, it is his master's act, for he supplies his place. Arg. Gro. E. 534. cites D. 438.

(K. 5) Deputy; his Power. *In Respect of the Words of Deputation.*

[ 119 ] 1. BY an ordinance of the government of the college of Wind-  
for (which consists of a dean, prebendaries, chaunters &c.), the dean may make a deputy, when he is disposed to absent himself, with power to the deputy in *omnibus exercere officium suum in personas & collegium memorat*. This deputy in the dean's absence cannot make a lease for years of their land, altho' the prebends join, and altho' it be under the common seal of the college; for the word *College*, as the word *Abbey*, extends only to the site of the college, but not to the possessions of the college. A rent granted out of the abbey goes only out of the site of it. By all the Judges. Collegium est societas plurium corp. simul habitant, and is constituted by the King only. Jenk. 229, pl. 77. cites 6 Eliz.

(L) What Estate by Implication will give Power to make a Deputy.

[ 1. THE Marshal of the King's Bench of inheritance cannot make deputy, unless it had been granted to him.

11 E. 4. 1.]

[ 2. The same law of Chamberlain of the Exchequer. 11 E. 4. 1.]

Fol. 155.

Jenk. 147. pl. 89.

(L. 2) Deputy. *What he may claim a Right to, as such.*

The case was, that one of the deputy clerks brought action of debt pro labore suo & pro

feodo of his master. Per Ley Ch. J. none but the chief officer shall have action, and not the deputy, because he is not accountable but of such sums as he receives; and judgment was, that plaintiff nil capiat per billam. 2 Roll. R. 475. Orwell v. Nicholson.

1. DEPUTY officer has all the entire office; as deputy he is chargeable over of the whole, and then if he has intire office, may receive fees, and consequently may demand them, and bring action for them. Per Ley Ch. J. 2 Roll. R. 367. Mich. 22 Jac. B. R. in Case of Orwell v. Nicholson.

2. Tho' a deputy by his constitution is in place of his principal, yet he *has no right to the fees*; they still continue to be the principal's. 2 Salk. 468. Mich. 3 Ann. B. R. Godolphin v. Tudor.

he has no remedy but by *quantum meruit*, and that against *his principal*. 6 Mod. 3 Ann. B. R. S. C.

If one put in a deputy without any allowance of salary, 235. Palsch.

### (L. 3) Deputy's Deputy.

Sta Steward.

1. THE office of *Marshal* may be exercised by deputy, if the grant be *per se vel deputatum suum*, but *shall not be by deputy of deputy, unless the grant be per se vel deputatum suum aut deputatum deputati*; and so it is admitted that the deputy may make a deputy in this case, and otherwise not. Br. Deputy, pl. 8. cites 10 E. 4. 15.

2. Acts done by a deputy *in facto tho' not de jure*, as where he was *deputy's deputy*, are well enough, they being done by him in the proper office, and in conjunction with other officers there. Cro. E. 534. Mich. 38 & 39 Eliz. Leak &c. qui tam &c. v. Howell.

### (L. 4) Pleadings by Deputy.

[ 120 ]

1. DEPUTY made seizure of prisage wines; and in trover brought against him, he justified as deputy, but did not shew how he was made deputy; and held he need not shew how, viz. whether by parol or by deed: because, 1. he claims no interest, but justifies all in *auter droit*, viz. of Sir T. W. and also he has said that he was *legitime deputat*, which is sufficient to instruct the Court, that defendant had sufficient privity and authority to seize the prisage. Yelv. 198. Hill. 8 Jac. B. R. Kenicot v. Bogan.

### (M) What Person may forfeit the Office, and \* to whom [and what].

Vide (K. 4)  
\* None of the pleas of Roll answer to this part of the title; but for this see (M. 1) + Br. Deputy, pl. 7. S. P. cites

[1.] IF the *Marshal* in fee of the King's Bench makes a deputy, if the deputy commits a forfeiture, this forfeits the *inheritance*. + 39 H. 6. 34. Vide 11 E. 4. 1. b. that the deputy is but the servant of the officer.]

S. C.—Per Jones J. he that has an *estate for life* in this office, is the owner, against whom the forfeiture shall run; and 'twas said that it ought to be of record in the Court who is officer, that the parties grieved may know against whom to bring their action. Skin. 114. Trin. 35 Car. 2. B. R. Lenthall's Case.

[2. But if he has power to lease for life, and lessee commits forfeiture; this shall not forfeit the *inheritance*. 39 H. 6. 34.]

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[3. If

This was of the dignity of an earl-

[3. If *Tenant in tail* of an office commits a forfeiture, this shall bind the issue. 11 H. 4. 1. b. 7 Rep. 34. Nevil's Case.]

and resolved to be a forfeiture by common law by *attainder of treason*, by a condition in law annexed thereto. 7 Rep. 33 to 35. Mich. 2 Jac. Nevil's Case.

But offices of *trust and confidence*, and which require skill, as park-keeper, cannot be forfeited by *attainder of treason*. Pl. C. 378. b. Sir H. Nevil's Case.

4. Agreed that a forfeiture could not be in the case of an office at will of a common person, yet in the case of the King there might. Per Holt Ch. J. Skin. 581. Trin. 7 W. 3. B. R. in the Case of the King v. Kemp.

S. P. by  
Ld. Ch. J.  
Hale and all  
the Justices  
of B. R. in  
the Lady  
Broughton's  
Case, that  
the forfei-

5. If an officer for life, where the reversion in fee is to another, commits a forfeiture, this is only a forfeiture of the estate for life; and he in reversion, and not the King, shall take the benefit thereof. Per Lord Keeper, assisted by Holt and Pollexfen, Ch. J. 3 Lev. 288. Mich. 2 W. & M. in Canc. The King and Queen v. Manlove.

the forfeiture belonged to the Dean and Chapter of Westminster, and not to the King, cited *ibid.*—2 Lev. 71. Mich. 24 Car. 2. B. R. The King v. Lady Broughton.

S. C. 2 Vent.  
187, 213,  
267.

6. Archdeacon within the patronage and diocese of the bishop of Lincoln, for 100l. granted the office of Registrar of his archdeaconry to J. S. and W. R. who die, and then the archdeacon granted it to the plaintiff: the office being forfeited by 5 and 6 E. 6. cap. 16. the question was, who should have the benefit of the forfeiture? whether the King, or the Bishop of the diocese? It was argu'd for the bishop, that he had the care and superintendancy of all the diocese, and that all is deriv'd out of him, viz. the archdeaconry and the office of registry; that the archdeacon is only a minister under him, to ease him of part of the care of his diocese, for which reason the bishop ought to have the disposal of it, where the archdeacon is disabled by the statute; and that tho' forfeitures given by statutes, generally are intended given to the King, yet where the forfeiture is a prejudice to any particular person, he, and not the King, shall have the forfeiture; as in case of forfeiture of the treble value, for withdrawing tithes by the statute of E. 6. But on the other side it was argu'd, that the King is *supreme ordinary*, and has the care of all the churches of England, and the bishops themselves are under him. As the leet is derived out of the tourn; yet if it be forfeited, the forfeiture is to the King, and not to the sheriff. And of this opinion were all the Court, viz. Pollexfen, Powell, Rooksby and Ventris; and that therefore the plaintiff, to whom the archdeacon had made a grant first, and also the King afterwards, had title by the King's grant, tho' not by the archdeacon's. 3 Lev. 289. Hill. 2. W. & M. Woodward v. Fox.

[ 121 ]

(M. 2) *Who shall take Advantage of the Forfeiture.*

1. **WHERE** a principal officer is by his office to make inferior officers under him, and the inferior officer commits a forfeiture, the superior officer shall take advantage thereof, and place a new officer, as was done 39 H. 6. for the office of the Marshal of the King's Bench put in by the Great Marshal of England. Agreed. Poph. 119. Hill. 38 Eliz. in Case of Earl of Pembroke v. Sir H. Berkley.

There is a difference where a officer grants a bribe to another for life, and the granted breaks a

condition in law, the intire office is forfeited: but if he has another inferior office derived out of his office, but not any part of the principal office, but appertaining thereto, and in his gift, the forfeiture of the inferior office is given to the grantor, and it is not a forfeiture of both offices; and this is the reason of the D. of Norfolk's Case. 19 H. 6. Per Popham Ch. J. Cro. E. 386. Pasch. 17 Eliz. B. R. in Case of Ld. Pembroke v. Sir H. Berkley.—Cited Arg. 2 Vern. 174. in Col. Leighton's Case.

2. Warden of the Fleet, if he has only estate for life, and commits a forfeiture, it shall be to the reversioner that has the inheritance, and not to the King. Arg. 2 Vern. 173, 174. Trin. 1690. cites DUKE OF NORFOLK's Case, 39 H. 6. and says that point was agreed in WHITCHCOTT's Case, and in MITTON's Case, 4 Rep. 32. b. and in CRABLEY the Exigenter's Case in Dyer, and in the Lady Broughton's Case.

3. If there are two officers in one intire office, and one surrenders or forfeits this shall redound wholly to the advantage of the other; for the office being intire, he cannot grant away his moiety. Agreed. Freem. Rep. 429. Trin. 1676. Woodward v. Aston.

(N) *What Act of Misdemeanor will be Forfeiture.*

[1. IF he does contrary to the duty of his office, as if he doth not [do] right to the parties, this misdemeanor is forfeiture. 11 E. 4. 1. b.]

Br. Forfeiture de Terres, pl. 61. cites

S. C. per Vavilour.

[2. Negligent escape is not cause of forfeiture of the office of Marshal. 39 H. 6. 33. b. Contra 4 E. 2. Liber Parliamentorum 78.]

Br. Forfeiture de Terres, pl. 27. cites

39 H. 6. 32. for it is only *finable*.

[3. But if he suffer several such escapes, it lies in discretion of [ 122 ] the Court to oust him. 39 H. 6. 34.]

[4. Voluntary escapes is forfeiture. 39 H. 6. 33. b.]

S. P. 9 Rep. 50. a. cites

S. C.—Pr. Forfeiture de Terres, pl. 27. cites 39 H. 6. 32.—If a keeper of a prison permits a wilful escape, 'tis a forfeiture of his office; but escape in the night is only negligence of the officer. Per Needham J. Quære inde. Br. Forfeiture de Terres, pl. 54. cites 4 E. 4. 26.—Two voluntary escapes by warden of the Fleet, was held to be a forfeiture of his office. 3 Lev. 288. Mich. 2 W. & M. In Canc. The King v. Manlove.

[5. A *Filazer* of the Bank surrenders his office from year to year without licence of the Court, and this was one of the causes that his office was forfeited. D. 2 and 3 Ma. 114. 64.]

S. P. 9 Rep. 96.

[6. The suffering of *voluntary escapes of felons, by a Sheriff of a county for life, or fee, is forfeiture of the office.* D. 4 and 5 Ma. 152. 4.]

7. Misfeasance of the office of *Marshal of B. R.* is a forfeiture of the office. Per Prisot. Br. Forfeiture de Terres, pl. 27. cites 39 H. 6. 32.

The mis-  
entry of one  
proclama-  
tion on a  
fine, and

the not entering another at all, was conceived by the Court to be a forfeiture of the office of *Chirographer*; for it was abusing of it. 2 Brownl. 300. Pasch. 7 Jac. Anon.

9. If the *Warden of the Fleet* does not bring in his prisoner when he is commanded by the Court, this is cause to seize his office, by the opinion of the Court. And if the prisoner escapes who is condemn'd, he shall pay the condemnation. Br. Office and Off. pl. 44. cites 9 H. 7. 55.

Extortion  
and Lord  
usage of  
the prison-  
ers, is fine-  
able, and

forfeiture of the office of *Keeper of the Gatehouse prison in Westminster.* Raym. 216. Mich. 24 Car. 2. B. R. Lady Broughton's Case.

11. Every *voluntary act* done by an officer, *contrary to what belongs to his office*, is a forfeiture of his office, as by foresters or *parker's* voluntary \* *killing bucks*, cutting of trees, wood &c. but otherwise it is of things done or suffered by his *negligence*, if it be *not common* or often. Poph. 118. Hill. 38 Eliz. Earl of Pembroke v. Sir H. Berkly.

Mo. 77.  
S. C. by  
name of  
Sir Henry  
Berkly v.  
the E. of  
Pembroke.  
\* Br. For-  
feiture de

Terres, pl. 49. S. P. cites 2 H. 7. 8. — S. P. Ibid. pl. 17. cites 15 E. 4. 3. per Brian. — Co. Litt. 233. b. — *But a parker saying, that he will kill the deer or cut the trees in the park is no forfeiture alone, unless he does it.* 11 Rep. 98. b. Trin. 13 Jac. B. R. in Bagg's Case. — S. P. either by himself or his servants; *so of abating any house within the park*; but otherwise if it was an office of inheritance, which the reporter says he does not believe, and cites 5 E. 4. 45. & 28 H. 8. And. 29. the Bishop of London v. Hero. — 4 Le. 120. S. C.

*So, surcharging the park with agittments is forfeiture.* Mo. 787. Mich. 4 Jac. Lady Ruffel v. Earl of Nottingham.

12. If one has the *custody of a castle* or house for life, and he *denies entrance* to the owner into the house, and shuts the door against him, it is a forfeiture of his office; per omnes J. Mo. 787. Mich. 4 Jac. Lady Ruffel v. the Earl of Nottingham. — Cro. J. 17. S. C.

Co. Litt.  
233. b. —  
S. P. 4 Le.  
120. — S. P.  
Mo. 10. pl.  
37. Trin.

3 E. 6. — S. P. Bendl. 20. — S. P. per Cur. Poph. 118. Hill. 38 Eliz. Earl of Pembroke.

13. If a *forester* or *parker* cut woods, unless for necessary *bruise*, it is a forfeiture of his office; for destruction of vert is destruction of venison. 9 Rep. 50. Trin. 8 Jac. in the Earl of Salop's Case.

Henry Barkley.—But it ought to be found by office, and a *scire facias* to issue against the \* forester, to which he may have answer. Sav. 1. Pasch. 22 Eliz. Taverner v. Gyles.—Misfeuser is a forfeiture of an office without *scire facias* sued if office be found. D. 151. b. pl. 4. marg.

(0) What *Non-feasance* &c. [will be a Forfeiture.]

See Disfranchisement (B.).

[1. *Non-feasance* of the office of *Marshal of B. R.* is a forfeiture. 39 H. 6. 34.]

Br. Forfeiture de Terres, pl. 27. cites 39 H.

6. 32.—There is a diversity when the office concerns the administration of justice &c. and the officer ex officio and of necessity ought to attend without request. 2dly, When he ought not to attend but upon request by him to whom he is officer; in this case *non-user* &c. is no forfeiture. 3dly, When it concerns the private interest of any, and he ought to attend, it is no forfeiture, unless some damage happens to him whose officer he is, in something which concerns his charge. 9 Rep. 40, in the Earl of Shrewsbury's Case.—Co. Litt. 133. a. S. P.—The office of *Marshal* concerns the administration of justice, yet his absenting himself was held no forfeiture unless summoned; for he may excuse himself, as that he was sick &c. according to Ja. Bagg's Case. 11 Rep. 99. a. per Twisden J. Sid. 15. cites it as ruled. 39 H. 6. in the D. of Norfolk's Case.

[2. The same law of the office of *Chamberlain of the Exchequer*. 11 E. 4. 1. b.]

[3. If officer be \* demanded and does not come (in convenient time as it seems) it is a forfeiture. 11 E. 4. 1. b.]

\* Br. Forfeiture de Terres, pl. 61. cites

S. C. And so of *non-attendance*; per Vavifour.—Ibid. pl. 115. S. P. cites 20 E. 4. 6.—*Non-attendance* is a forfeiture of the office of *Recorder*. 2 Salk. 435. Hill. 4 Anuz B. R. Whitacre's Case.—102.—S. C. 11 Mod. 61. but no judgment.

4. A *Filazer of Bank* was absent two years, and for this discharged. Per Curiam. 2 & 3 Ph. & M. Dy. 114.

5. 1 H. 4. cap. 13. enacts, That all customers and comptrollers shall be resident upon their offices in their proper persons, without making any deputies in their places.

6. And by 13 H. 4. cap. 5. All customers, comptrollers, gaugers of wine, and searchers, shall be resident upon their office, especially at the time of charge and discharge of ships and vessels; so that no such officer at the time aforesaid, be absent from his said office by three weeks at the most, in pain to lose his office, unless he be commanded upon record to be in the King's Courts, or otherwise in the King's service of record.

7. Annuity was demanded for office of *Parkership* granted to him for life, the defendant said, that the office was granted to the plaintiff ut supra, and that such office had been time out of mind, and that the keepers have kept the deer and the wood for the same time, and that from the 2d day of July till the 14th day of the same month 22 *servages* were killed by persons unknown, in negligence of the plaintiff; and this &c. Per Young, by negligence of the officer, the annuity and office are extinct. Br. Forfeiture de Terres, pl. 54. cites 5 E. 4. 26.

Ibid. pl. 55. S. P. cites 5 E. 4. 5. Br. Office & Off pl. 26. cites S. C.—But without assigning a special default it is no plea. Br. Dette, pl. 152. cites

5 E. 4. 5.—If I grant annuity to J. S. to keep my park, and after the game is killed in his default, this is an extinguishment of the annuity. Br. Annuity, pl. 49. cites 5 E. 4. 5.

If the office of *Parker* be granted to a man, if he does not keep the park it is a forfeiture of his office. Br. Forfeiture de Terres, pl. 49. cites 2 H. 7. 8.—A *parker* shall not forfeit his office for *non-attendance*, unless a deer be killed in his absence, or the like. Arg. Vent. 144.—But should he desert

desert his office *for five years*, it would make a forfeiture without a special damage. Arg. on the other side. Vent 15. Trin. 23 Car. 2. B. R. In *Ld Hawley's Case*.—Contra, if the non-attendance be for a few days and no damage happen. Co. Litt. 233. a.

8: But a Parker is not bound to keep the park every day, nor *Sunday*, nor *Festival days*, but shall be at Divine service; nor in the night, nor to keep it against 6 or 8 men, for it is out of his power. Br. Forfeiture de Terres, pl. 54. cites 5 E. 4. 26. per Needham J.

[ 124 ] 9. If a *Steward does not hold the Courts*, or does not hold them for the profit of the Lord, it is a forfeiture of his office; per Chocke. Br. Forfeiture de Terres, pl. 54. cites 5 E. 4. 26.  
If I grant the stewardship of my manor of D. to hold two Courts at two certain days; if he does not hold the Courts, he has forfeited the stewardship; per Hale J. Mo. 9. Trin. 3 E. 6. Anon.

10. A Parker for life *refused to serve a warrant* sent him by the owner of the park, and would not suffer it to be served; this is a forfeiture; per Hales and Brown; but per Montague Ch. J. it is a disobedience only, and no forfeiture. Mo. 9, 10. Trin. 3 E. 6. Anon.

11. In all cases where the officer relinquishes his office, and *refuses to serve*, he loses his office, fee, profit, and all. Co. Litt. 233. b.

12. If Tenant in tail of an *office of trust* mis-uses or non-uses it, these are forfeitures of such offices for ever by force of a condition in law tacitly annexed to their estates, as it is held in 11 E. 4. 1. 20 E. 4. 5, 6. 39 H. 6. 32. 22 Aff. 34. 8 H. 4. 18. 2 H. 7. 11. 14 H. 7. 1. and Pl. C. 370. *Nevil's Case*. 7 Rep. 34. b. Mich. 2 Jac. *Nevil's Case*.

13. *Clerk of a market* forfeits the office for non-attendance; for his attendance is necessary for the public good. 2 Rep. 50. a. Trin. 8 Jac. in the *Earl of Salop's Case*.

14. It was found by inquisition upon a commission issu'd out of Chancery, that J. S. *Searcher of the port of S. for life*, had committed several misdemeanors to the great prejudice of the King, and forfeiture of his office, and among the rest was this, viz. that he *voluntarily suffer'd a ship laden with several commodities* (naming them) *to be exported, and other ships to be imported and unladen without being search'd*; but this was found to be at a time when neither himself nor any of his deputies were there; so as it appears not whether it was by negligence or voluntary. But all the Court held, that this voluntary absence and neglect, so as neither himself or servants were there to search, is not only crassa negligentia, but a *voluntary permission*. Cro. C. 491. Mich. 13 Car. B. R. *The King v. Rooks*.

15. Another cause of forfeiture in issue was, that he *seised divers goods forfeited for not being custom'd and accounted not to the King for them*, but converted them to his own use; he pleaded, that he was ready to account and travers'd the conversion. Upon evidence it appeared, that he seised them as forfeited, and never tender'd to account nor brought them into the Exchequer, nor signified in the Exchequer what they were (as he ought to have done)

done) but sold them in London, which was clear conversion; and so this issue was also found against him. Cro. C. 492. The King v. Rooks.

16. The non-attendance of a *burgess* of a corporation at the sessions is not a good cause of removal; for the absence of a single alderman does not hinder the holding of Courts, or the validity of the acts of that Court; so that his absence does not amount to a non-user of the office. 10 Mod. 108. Mich. 11 Ann. B. R. The Queen v. the Mayor &c. of Pomfret.

17. Serjeant Hawkins says, it is certain that an officer is liable to a forfeiture of his office, not only for doing a thing contrary to the design of it, but also for neglecting to attend his duty at all proper and convenient times and places, whereby any damage shall accrue to those by or for whom he was made an officer. And he says, some have gone so far as to hold, that an *office concerning the administration of justice or the common wealth*, shall be forfeited for a bare non-user, whether any special damage be occasioned thereby or not; but that this opinion does not appear to be warranted by any resolution in point, and the authorities which are cited [in the † margin] to maintain it, do not seem to come up to it. However that it cannot but be very reasonable, that he who so far neglects a public office, as plainly to appear he takes no manner of care of it should rather be immediately displac'd, than the public be in danger of suffering that damage, which cannot but be expected some time or other from his negligence. Hawk. Pl. C. 167, 168. cap. 66. S. 1.

*some special loss occasioned thereby* as in the other it is, was agreed. 10 Mod. 108. Mich. 11 Ann. B. R. in Case of the Queen v. the Mayor and Burgesses of Pomfret.—† 39 H. 6. 32. 20 E. 4. 5. b. 22 Aff. 34. 2 H. 7. 11. b. Pl. C. 379. L. Quinto E. 4. 27. 11 E. 4. 1.

\*9 Rep. 50. a. E. of Shrewsbury's Case.—Co. Litt. 233.—This difference taken in 9 Rep. 99. between public offices that concern the administration of justice and private offices, viz. [ 125 ] that non-user in the one is no forfeiture without a request, and

## (O. 2) Forfeiture. Pleadings.

1. *ANNUITY* for keeping a park; the defendant said, that the plaintiff by 12 days, and shew'd certainly when &c. *parcum predict. custodire neglexit*, and that 12 unknown killed 22 deer through the negligence of the plaintiff, and it was held no issue; for *neglexit custodire* is to deny to keep the park, by which Young took the issue that by 12 days as above &c. *parcum predict. non custodivit*; per quod &c. as above; and per Danby Ch. J. this is the better issue. Br. Issues joinses, pl. 30. cites 5 E. 4. 26.

2. A judgment was had in a writ of annuity granted to the plaintiff for life, to exercise the office of Steward; a scire facias was brought for the arrearages of one year incur'd after the judgment. The defendant pleaded to the action of the writ, viz. that the plaintiff pending the plea, being requested to hold Court &c. refused it. And this was held by all the Justices and Clerks a good plea, without answering to the arrearages incur'd before the writ of scire facias. D. 377. pl. 28. Trin. 23 Eliz. Anon.

*grantee refused*, this is no forfeiture; because the summons is void. D. 377. pl. 28. marg. cites 27 Eliz. Hurleston's Case.

But where one tenant in common granted annuity for holding Courts, and he summon'd a Court without his companion, and the

3. A. was seised of the office of *Custos Brevium*, and of keeping the rolls, and making the *nisi prius* in B. R. and that he, and all those who had that office time out of mind &c. had 7 under clerks who had certain fees, and that the plaintiff such a day &c. was admitted to the office of one of the clerks, and enjoyed it till he was ejected by A. the defendant &c. Upon a trial at bar the plaintiff had judgment; and it was moved in arrest of judgment, that this was not an office, but an employment; for A. by their own shewing has the making and custody of every thing and is answerable for all miscarriages, so that the 7 under clerks are no more than his servants, and removeable at pleasure. 2. If the plaintiff was an officer, he ought to have shewn of what office, because by his own shewing the defendant had several, and if he was an officer then his office was void by 5 & 6 E. 6. cap. 16. for it appears by his confession under his hand that he gave money for it, and this is an office of justice. 3. He did not sit forth that he was *debito modo admissus & jurat*. but adjudged that admitting it to be no office, but only an employment, the defendant could not turn him out at pleasure; for if he might, then the secondary and the clerks of the papers of B. R. might be turn'd out by the chief clerk, and both these officers claim'd privilege as his clerks; and as to the buying offices, those which are sold by any of the Chief Justices, are excepted out of the statute of E. 6. Sid. 74. Pasch. 14 Car. 2. B. R. *Whitechurch v. Paget*.

[ 126 ] (O. 3) Forfeiture of Offices by Sale. And Sale thereof *prohibited*, in what Cases.

1. 12 R. 2. ENACTS that the Chancellor, Treasurer, Keeper of the privy seal, Steward of the King's house, the King's Chamberlain, the Clerk of the Rolls, Justices of the Bench, Barons of the Exchequer, and all others called to name and ordain Justices of peace, sheriffs, escheators, custumars, controullers, or any other officer or minister of the King, shall be firmly sworn, that they shall not name or order any officers or ministers for any gift or brokerage, favour or affection: and none which pursueth by him or by other, privately or openly, to be in any such office, shall be put in the same or any other: but that they make all such officers and ministers of the best and most lawful and sufficient men in their judgments and knowledge.

The sale of a bailiwick of a lord is not within this statute. For such an office does not concern the administration of justice; nor is it an office

2. 5 & 6 E. 6. 16. enacts, That none shall bargain or sell any office or deputation, or any part thereof, or receive or take any money, fee, reward, or any other profit, directly or indirectly, or any promise, agreement, bond or assurance to receive any such profit for the same, which office shall concern the administration or execution of justice, or the receipt, controullment, or payment of any of the King's money or revenue, or any account, aulnage, auditorship, or surveying of any of the King's lands, or any of his customs, or any administration or attendance in any custom-house, or the keeping of any of the King's towns,

*towns, castles or fortresses (being places of strength or defense), or any clerkship in any Court of Record; in pain that the bargainee thereof shall lose his place, and the bargainor be adjudged disabled to execute the same; and every such bargain and\* agreement shall be void.*

of trust.—  
4 Le. 33.  
pl. 91.  
Trin. 19  
Eliz. B. R.  
Godbolt's

Cafe.—But the office of *Curfitor* is within the statute; per Winch. Brownl. 71. in Cafe of Williamson v. Barnley.

If any one procures an office to himself of the gift of the King for 1000l. yet the office is not lost by this statute. So if it be taken of the King himself for money, yet the office is not lost; per Hobart ac. general. Arg. Rull. R. 157. Patch. 13 Jac. in Cafe of Warren v. Smith.

The office of *Clerk of the Fleet prison* is not within this statute. Vid. Fin. R. 50. Hill. 25 Car. 2. 1673 Meakin v. Whitchcott & al.

In debt on bond, the defendant pleaded this statute; and the question was, whether the office of *Salicitor of the Treasury* be within the statute? Holt, Eyre and Gregory J. held it was not, but Dauben J. thought it was, et ad ornatur. Comb. 126. Trin. 1 W. & M. B. R. Loyd v. Rowie.

\* In debt upon bond, defendant pleaded, that it was enter'd into for the sum therein mentioned, the same being for the purchase of an office, and aver'd that there was no other consideration &c. The plaintiff demurr'd; and it was insisted that defendant should have pleaded the statute of 5 and 6 E. 6. against selling offices; which makes such bonds void; for the rule is, that when a statute makes a specialty void, it must be pleaded, and cited 5 Rep. 119. Luw. 464. that the condition here does not set forth that the payment was to be for the purchase of an office, and so the entry into it may be for a valuable and legal consideration, so that this is a mere averment of debtors; that this bond may be within the exception of the statute, which plaintiff cannot shew, the defendant not having pleaded the statute; for the plaintiff must answer the plea. But per Cur. this statute is a public law, and therefore we must take notice of it, and so of the cases excepted out of the same, within which, for any thing that appears, the plaintiff may be; and inclin'd that for that reason the defendant should have pleaded the statute, to give the plaintiff an opportunity of shewing that his case was within the exception of it. Gibb. 45. Hill. 2 Geo. B. R. Hornby v. Cornford.—After the defendant's counsel offer'd to pay the money and so it ended. Ibid.

*Provided that this act shall not extend to any office of inheritance, for the keeping of a park, house, manor, garden, chase or forest; nor to the two\* chief justices, or justices of assize, but that they may grant offices as they did before the making of this act; also all acts done by any officer removable by force of this statute shall be good in law, until be be removed.*

\* Sid. 74.  
Whitchurch  
v. Paget.

3. A. brought debt against M. executrix of B. upon a bond of 1000 marks. The case was, that B. the testator was customer of the Queen by patent to him and his deputies, and by indenture between him and J. S. who died leaving A. his executor, for 600l. paid and 100l. a year to be paid during A's life, made depuration of the office to A. And B. covenanted with A. that if B. died before A. then B.'s executors should repay to A. 300l. And divers other covenants were in the said indenture concerning the said office and the enjoyment of it; and B. was bound to A. in the said bond for performance of covenants. The breach was alleged in nonpayment of the 300l. inasmuch as A. survived B. But tho' the said covenant for re-payment of the said 300l. was lawful, yet the other covenants being against the statute of 5 E. 6. 16. the bond was adjudged utterly void, and that the addition of one lawful covenant shall not make it good; for if it should the statute would serve to very little purpose. 3 Rep. 82. b. 83. a. cites 38 Eliz. C. B. Lee v. Colshill.

Part of the agreement was to procure a new grant to A.

[ 127 ]  
and B. and the survivor of them; and B. covenanted accordingly with A. that he up on request of A. would surrender the patent to the Queen, to the intent that a new one might be made ac-

cording to the said agreement, which said agreement was for the office; and so the bond void. 2 And. 55. pl. 42. S. C. by name of Smith v. Colethill.—Ibid. 107. pl. 58. S. C. by name of Lee v. Colethill.—Cro. E. 529. pl. 58. Mich. 38 & 39 Eliz. S. C.

Mo. 781.

43 Eliz.

S. C. accordingly by name of Stockwith v. North.—H. being high sheriff contracted

with B. for the under-sheriff's place, and for the payments thereof gave a bond of 200l. to H's son; the Court inclin'd that the bond was void (and the reporter says, that it was so adjudg'd in B. R. ut adivit), but by the defendant's mispleading it was put off till the next term. Freem. Rep. 19. Mich. 1671. C. B. Browning v. Halford.

4. N. was sheriff of Nottingham 43 Eliz. and took money for the offices of gaoler and bailiwick, and he first gave them to his servants who sold them, but he had the money, and he was fined for that; for it is contrary to 4 H. 4. cap. 5. and also by the Court, that that is a corruption, and a great cause of oppression in the officers, and such sale of offices is malum in se and finable. Noy. 102. Stockwell v. North.

5. In action on the case for 20l. a year to be paid to a Justice of Wales for the office of Clerk of the fines, where the clerk's fee was 5 s. 4d. of every fine, Coke said, that the assumpsit is void by the statute 5 & 6 E. 6. cap. 16. for it is not lawful to sell such an office. Goldsb. 180. pl. 113. Hill. 43 Eliz. Walter v. Walter.

S. C. cited by Coke Ch. J. and that Sir A. J. was a person disabled to take that office, so as at no time during his life he could have it, tho' it should become void by the death of any other officer thereof, and that a new grant should be made to

him. Cro. J. 386. Mich. 13 Jac. B. R. in case of the King v. Bishop of Norwich and Saker.—13 Inst. 154. S. C. by name of Sir Arthur Ingram's Case.—Roll. R. 236. 237. cites S. C. and that Sir A. J. was for ever incapable of the said office by force of the said statute.—Hob. 75. pl. 92. cites S. C. and P. for the person being disabled by the statute could not be enabled by the King.

12 Rep. 78.

S. C.—

2 Brownl.

11. S. C.

by the name of Robotham v. Trevor.

7. The offices of Chancellor, Register and Commissary in ecclesiastical Courts, are within the statute of 5 & 6 E. 6. For tho' they concern matters principally pro salute animarum, yet they also concern matters about matrimony and legitimation, which touch the inheritance of the subjects, and about matters of legacy for chattels real and personal; and in that respect are Courts of justice. Cro. J. 269. Hill. 8 Jac. B. R. DR. TREVOR'S CASE for the Chancellorship of Landaff.

[ 128 ]

8. The Stewardship of a Court Leet is within this statute; per Winch. J. who said it had been so adjudged in Gray's-Inn. But the question in the principal case was, whether a bond conditioned for performance of articles in an agreement to sur-

render

render and yield up his letters patents of the stewardship of Bromf-grove to the plaintiff, to the intent he might renew them in his own name, was within the statute or no, the words of the statute being (*to have and enjoy*) and Winch. said, that it was within the statute. Brownl. 70, 71. Trin. 12 Jac. William-son v. Barnsley.

9. A. a *Bishop's Register* for a sum of money granted the deputa-tion to J. S. for a term of years, who enjoyed the same for some time, but was turned out before the term expired. A. having got the agreement in writing, refused to deliver it to J. S. so that he could have no remedy at law, and therefore brought a bill in Chan-cery. The defendant demurred, and for cause set forth this statute prohibiting the sale of any office of justice, or the depu-tation thereof, and averred that the office of register concerned the administration of justice; and for that the plaintiff by his bill confessed that he had given money, or contracted for it contrary to the meaning of the statute, therefore he was disabled to execute the same; and the demurrer was held good. N. Chan. R. 27. 9 Car. 1. Lake v. Pigeon.

10. A bond was entered into before the wars, conditioned to pay 40 l. a year for 12 years out of the profits of an office, which was [afterwards] taken away by the usurpers. The office was revived, and the obligor being sued upon the bond, he exhibited his bill to be relieved against the bond. The obligee insisted, that the office continued some part of the 12 years, and being now re-vived, the obligor ought to pay the 40 l. a year for 12 years, or be dismissed; for the obligee having the law with him ought not to be hurt in equity without satisfaction according to the condition. Decreed, that the obligor pay the 40 l. for so many years as the office continued, and thereupon the bond to be delivered up. Chan. Cafes 72. Hill. 17 & 18 Car. 2. Lawrence v. Brafler.

the case what the office was; and the only question there was, whether the party should pay for the time he was dispossessed. Chan. Cafes, in *Id Talbot's case*. 142.

11. Debt on bond for performance of covenants in a *demise of the bailywick of the Savoy*, by which among other things he demised to the defendant goods of felons, waifs, estrays, &c. and made the defendant his deputy bailiff, rendering rent 60 l. a year. Upon de-murrer, the Court held the indenture void within the statute of 5 & 6 E. 6. for tho' the bona felonum may be legally demised, yet if being with the making the defendant deputy bailiff, and demise of the bailywick to him, this makes all void. 2 Lev. 151. Pasch. 27 Car. 2. B. R. Ellis v. Ruddle.

feudant, and offices in fee are excepted out of the statute, by which all under leases are in usufruct ex-cepted, the Court, because the feisin in fee of the King did not appear upon this record, ordered the parties to plead. *Ibid.*—Leasing the bailywick of the Savoy rendering rent, was agreed per Cur. not to be a buying an office within this statute; for all the bailywicks of liberties in England are bought and sold, and the *Marbals* of B. R. and the *Under Warden of the Fleet's place* &c.—*Freem. Rep* 428. Trin. 1676. Nelson's Case.

12. The statute of 5 & 6 E. 6. extends not to the office of *Provost Marshal in Jamaica*; for being a conquered country, the laws

S. C. taken notice of by Lord Chan-cellor, as cited by the counsel for the defend-ant, in the *Case of Law v. Law*. Mich. 1735. about the buying of offices, and said that it does not at all appear in

But because the truth of the case was, that the King was *seisin in fee of the bailywick*, and demised it to the plain-tiff, who demised it to the de-

In the Case of Secretary to the Co-

vermour of Barbadoes, curia advi-  
sare vult. 2 Mod. 4c.  
Trin. 27 Car. 2. C. B. Daws v. Sir Paul Pindar.—In debt upon bond, the defendant pleaded this statute, and that there was an agreement for a rent for the office of *Secretary of Barbadoes*, and averred it to be an office of justice. Upon a demurrer, the question was, if this office being in Barbadoes, not within the King's dominions at the time of the statute, were void by this statute. The Court inclined that the plea was good, this office *being a grant by patent under the Great Seal of England*; and were it an office in the *Admiralty or Spiritual Court*, it would be within the statute. But adjournatur. 3 Keb. 26 Pasch. 24 Car. 2. B. R. Daws v. Painter.

[ 129 ] 13. An officer within the statute 5 E. 6. (viz. a *surrogate*) makes a deputation of his office, *rendering thereout 90 l. per ann.* Defendant pleads the deputation void by the statute, and ought to have no account, it being in effect a *farming* within the statute; after long debate the plea was allowed. 2 Chan. Cafes 42. Hill. 32 & 33 Car. 2. Juxon v. Morris.

Ld Chan-  
cellor Tal-  
bot cited  
S. C. and  
said, that  
it had no-  
thing illegal  
in it; for  
the payment  
was not to  
be absolute,  
but only in case the profits amounted to 400 l. or more; besides the whole profits be-  
longing to the sheriff himself, it was but a reservation of what was his right, viz. the profits of the  
office. Chan. Cafes in Ld. Talbot's time 142. Mich. 1735. in Case of Law v. Law.

14. A bond was made without condition, but intentionally for performance of covenants to save the *high sheriff* harmless from escapes, and to pay the high sheriff out of the profits of the office, 400 l. The Lord Chancellor was seemingly of opinion for the payment, and ordered a trial what the agreement was, whether to have the 400 l. or not. 2 Ch. Cafes 48. Hill. 32 & 33 Car. 2. Lockner v. Strode.

2 Vent.  
187, 212.  
267. S. C. 15. An *Archdeacon's Register* is within this statute, and tho' the persons to whom the sale and grant was made *die*, yet the archdeacon is disabled by the statute to make any other grant thereof; but the King shall have the nomination, and that before any office found. 3 Lev. 289, 290. Hill. 2 W. & M. C. B. Woodward v. Fox.

8. C. cited  
by Lord  
Chancellor.  
Chan. Cafes  
in Ld. Tal-  
bot's time.  
142. in Case  
of Law v. Law. 16. A. gives bond to B. for B's quitting his pretence and procuring A. to be purser of a man of war; Per Cur. We cannot set aside the bond, but will relieve on payment of the 400 l. principal without interest or costs. 2 Vern. 308. Hill. 1693. Symonds v. Gibson.

of Law v. Law.—So for a surrender of a captain's commission to make way for the lieutenant, tho' the captain died before the lieutenant was admitted. Vern. 98. Mich. 1652. \* Berisford v. Done.—So for surrender of an office where the *obligor* was refused to be admitted, because not fit for the employ, as was thought by the superiours. Vern. 99. cited by Mr. Hutchins in Case of Berisford v. Done, as decreed the last Term.

\* S. C. cited by Ld Chancellor Talbot, who said, that no law prohibits the sale of a commission in the army, any more than it does that of a purser of a ship. Chan. Cafes in Ld Talbot's time. 142. in Case of Law v. Law.

The statute does not extend to *military offices*. Ch. Prec. 179. Trin. 1702. Irv v. Ash.

Comb. 356.  
Hill. 8 W.  
3. B. R.  
S. C. 17. Bond was given by deputy to principal to pay him *half the profits* of the office. This bond is not within the statute; because the condition is not to pay him *so much in gross*, but half the profits, which must be sued for in the principal's name; for they belong to him, tho' out of them a share is to be allowed to the deputy

deputy for his service. 2 Salk. 466. Hill. 8 W. 3. B. R. Culliford v. De Cardonel.

18. Where an officer is within the statute, and the salary certain, if the principal makes a deputation, reserving a lesser sum out of the salary, it is good; so if the profits are uncertain, arising from fees, if the principal makes a deputation reserving a sum certain out of the fees and profits of the office, it is good; for in these cases the deputy is not to pay unless the profits rise to so much. But where the reservation or agreement is not to pay out of the profits, but to pay generally a sum certain, it must be paid at all events, and such bond is void by the statute. 2 Salk. 468. Mich. 3 Ann. B. R. Godolphin v. Tudor.

19. A. procured B. his brother a place of Supervisor of the Excise, and further promised to procure B. to be made Collector; whereupon B. gave to A. a bond to pay him 10 l. a year, so long as he (B.) should continue supervisor (his then office), and 20 l. a year so long as he should be collector. B. paid one payment of 10 l. to A. and died, leaving M. his wife who administered. A. sued the bond against her, who brought a bill to set aside the bond, and \* to have the 10 l. refunded. Ld Chancellor said, that this is but one agreement, notwithstanding it respects two periods of time, viz. that of having obtained the office of supervisor, and that of procuring the collectorship; and then the condition is to pay two several sums; that the office is certainly within the statute as it concerns the King's revenue. And tho' this be not a sale within the statute directly, yet in effect it is, there being little or no difference between a commissioner's taking a sum of money, and another person taking it to influence the commissioner. That the inconveniences are the same, since thereby the persons appointing are deceived, and so is the public. The objection that this being a penal law is not to be extended in equity is easily answered; for tho' penal laws are not to be extended as to penalties and punishments, yet if there be a public mischief, and a court of equity sees private contracts made to elude laws enacted for the public good, it ought to interpose. And his Lordship said, that marriage brokerage bonds fall directly within the reason of this case; and decreed the bond to be cancelled, and a perpetual injunction. Chan. Cases in Lord Talbot's time. 140. Mich. 1735. Law v. Law.

12 Mod. 90.  
S. C. —  
6 Mod. 234.  
Mich. 3  
Ann. B. R.  
S. C. —  
S. P. Cumb.  
356. Culliford v. Cardonell, S. P. —

\* Non constat, whether this matter was decreed or not.

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(O. 4) Officer discharged or Office determined. In what Cases, and the Effect thereof, as to the Fees &c.

NOTE that the office of King of Herald's was granted to Garter cum feodo et proficuo ab antiquo &c. et concessit to him 10 l. for term of life pro feodo pro officio illo &c. and there was a general resumption anno 2 E. 4. with proviso for annuities and pensions; and by all the Justices, if the office be gone the annuity

Br. Office and Officer, pl. 50. cites S. C. —  
Br. Patents, pl. 60. cites S. C. —

And where an annuity is expired; for this is granted by reason of the office, and yet the office was at will, and the annuity is for term of life. Br. the Clerk of Estates, pl. 44. cites 5 E. 4. 8.

*the Crown* for life for the office, a discharge of the office is a discharge of the annuity, by the opinion of the Justices. Br. Estate, pl. 4. cites 5 E. 4. 8.—So if a man grants an office at will with 10 l. fee pro officio illo exercendo for term of his life, if the office be retaken, the fee is gone, and yet the one is at will, and the other is franktenement. Br. Estate, pl. 64. cites 50 E. 3. 10.

Where a man grants the office of bailey, steward, receiver,

2. I may oust a bailey, receiver, &c. paying to him his fee; for the rest is charge and not profit. Quære of a steward; for assise will lie of such ousters. Br. Grants, pl. 93. cites 8 E. 4. 7. and 34 H. 8.

*parker, &c. and a fee certain for his labour only*, there the grantor may expulse such officers, but they shall have their fee; for it is only an office of charge; but where the steward and parker have profits of courts, winfalls, deer skins, and such like casual profits, it is said that they cannot be expulsed, and that of such offices they may have an assise. And the officer may relinquish his office when he will, but then his fee shall cease, and Who. wood attorney-general granted the cases above; tamen quære; because assise lies of the office. Br. Grants, pl. 134. cites 31 H. 8. and Mich. 5 E. 6.—S. P. per Coke Ch. J. Roll. R. 83. Mich. 12 Jac. B. R. cites 18 E. 4. and 15 E. 4.—Cro. E. 336. Ferrer v. Johnson.

Br. Office and Officer, pl. 29. cites S. C.

3. Where I grant to a man to be keeper of my park for two years by deed, and after I command him that he shall not meddle, this is a void command, and he may occupy; for it is a disadvantage to the parker to cease to occupy; per Choke. Br. Covenant, pl. 31. cites 18 E. 4. 8.

Br. Office & Off. pl. 29. cites S. C.

—If one grant an office of bailiff or steward &c. with the profits thereof, without rendering an account, he cannot discharge the

4. If I grant to a man to be my steward of my courts, taking 10 l. per annum of the issues and profits of the courts for his fee, and I command him, that he shall not meddle, this is a void command; for it is a disadvantage to the steward; for he cannot have his fee, if no courts be held; but upon such grant, and 10 l. fee to be paid by the grantor, or if it be granted out of other land, there such command is good; for the steward shall have his fee, though he holds no courts, and there it is no disadvantage to any but to the grantor himself; per Littleton. Br. Covenant, pl. 31. cites 18 E. 4. 8.—And this was held for law in the time of H. 8. Ibid.

grantee, but he shall continue to have the profits of the office; secus if no fee or profits had been granted for the exercising thereof. Cro. E. 335. Trin. 36 Eliz. C. B. Ferrer v. Johnson.

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There is a diversity between officers that have no other profit but a certain collateral fee; for there the grantor may discharge him of his service, as bailiff, receiver, surveyor, auditor &c. the exercise whereof is but labour and charge to them; but he

5. A. seised in fee of a manor granted to J. S. by deed to be bailiff thereof for life; afterwards A. sold the manor to B. who appointed W. R. to collect the rents, which W. R. did, and thereupon J. S. brought an action; but upon a demurrer, all the Court were of opinion, that B. might discharge J. S. because he does not know any fee granted for executing the said office, nor that he had any other profits thereby; and then it is only an office of trouble, and J. S. has no cause to complain; but in case he had a fee or other certain profit for executing thereof, it had been otherwise Adjudg'd for the defendant. Cro. E. 859. Mich. 43 & 44 Eliz. C. B. Harvy v. Newlin.

must

must have his fee; for none can derogate from his own grant to the prejudice of the grantee; and where, though the grantee has no other profit but his fee, yet *that fee is to be received and taken out of the profits appertaining to the Lord within his office*; for there the grantor cannot discharge him of his service or attendance; because that may be to the grantee's prejudice if the grantor will not grant the office at all. And there is another diversity where the grantee, *besides his certain fee, hath profits and avails by reason of his office*, there the grantor cannot discharge him of his service or attendance; for that would be to his prejudice. As if a man grants to another the *stewardship of his courts with a certain fee*, the grantee cannot discharge him of his attendance; because he has other profits and fees belonging to his office which he should lose if he were discharged. Co. Litt. 233. a. b.

6. Though it be true, that an officer to whom an office is granted *for life or years*, and is to have the profit of *casual fees*; as steward, bailiff, or parker (as is 31 H. 8. Br. Grants, 134. and 34 H. 8. 93.), cannot be discharged of the office, for then he should not have his casual fees, that is to be understood, that the grantor can *not appoint another* where the park or manor always continues, as 18 E. 4. 9. But when the park itself is determined and disparked, the office appendant thereto shall also be determined, but cannot discharge the officer before and make another; but though the casual profits of the office are gone with the office being destroyed, yet an *annual fee* granted for life in consideration of the office, and not out of the park &c. but to *issue out of all the grantor's manors in that county* &c. and granted by a *distinct clause*, the fee shall continue, the office not being determined by the default of the grantee. Cro. C. 59. Hill. 2 Car. in the Exchequer Chamber, Sir Charles Howard's Case.

Jo. 151. S. C.—The King may discharge the patentee of keeper of a park of his office, tho' the park continue; and if one grant the *stewardship of a manor*, and he dismembers the manor, the office *termines*. But it was agreed, that the *annual*

*fee certain* remains in both cases, he be discharged, or be the park disparked. Hutt. 86. Hill. 2 Car. Sir Charles Howard's Case.

7. If a Corporation grant the office of a Town-clerk, or of Recorder, and after surrender their patent, and take a new patent, all the offices are determined. Hutt. 86. Hill. 2 Car. in Sir Charles Howard's Case.

## (P) How an Officer may be discharged.

[1. A *Filazer* of the Common Pleas having committed a forfeiture, was discharged by the Court of Common Pleas *by words openly in Court without any record made of it, or ever calling the officer to answer*, and a good discharge. D. 2 & 3 Ma. 115. 64.

Though no record was entered in the Rolls of the Court of the cause of forfeiture, nor

any discharge of a *filazer*, yet when the Ld. Ch. J. discharged him, *ex assensu sociorum fuorum by words openly in Court*, calling the filazer to him, which was well prov'd, this was a good discharge, and no cause of assise to the plaintiff. D. 115. pl. 64.

2. A Corporation have power to chuse a Recorder either *pro termino vitæ*, or *ad voluntatem eligentium*; they chuse a recorder, and after remove him, and constitute another under their common seal; Per Cur. such recorder is removeable at pleasure, and such

2 Show. 70. the King v. the Mayor of Cambridge.—S. C.—If a

Corporation have power to remove at their will and pleasure, this will must be expressed under their common seal; but in a return to a mandamus debito modo amotus is sufficient. Vent. 342. Trin. 31 Car. 2. B. R. Pepis's Case. *such removal is not necessary to be \* under their common seal, unless he was constituted under their common se. l.* (though it was objected that a Corporation aggregate cannot determine their will but under their common seal, and that that was not shewn) and now it is well enough, the new recorder being constituted under their common seal, which act removes the other. Vent. 342. Trin. 31 Car. 2. B. R. Pepis's Case.

(P. 2) Removeable *without Cause shewn* or not.

Vent. 342. S. C. by the name of Pepis's Case. 1. A Corporation have power to chuse a Recorder by charter *ad terminum vite* or *ad libitum*; they chuse J. S. recorder, and afterwards removed him, and held good without shewing cause. 2 Show. 70. Trin. 31 Car. 2. B. R. The King v. the Mayor &c. of Cambridge.

(Q) Officer. Receiver-General; *what Things he may do.*

So is the distress is taken for rent by the Lord's bailiff, the General Receiver cannot make deliverance without the command of his Lord. Br. Office & Off. pl. 5. cites S. C. [1. MY Receiver-general has not power to make deliverance of a distress taken by me. 2 H. 4. 15. b.]

(R) Inconsistent Offices.

Roll. R. 455. 1. A Forester is made Judge, the other inferior office is gone. Roll. R. 452. cites D. 29 H. 8. Br. Offices.

Br. N. C. 5 Mar. 1. pl. 498. 2. If an incumbent of a benefice be made a Bishop, the first benefice is void; for he who has the office of the sovereignty cannot have the office of the inferior, by some of the Justices; but quære; for a Justice of B. R. may be a Justice in oyer, or of oyer and terminer, or of the peace, or of gaol delivery, and yet if they err in their pleas in the oyer, or in the oyer and terminer, or their process or outlawry, before Justices of the peace, writ of error lies thereof before the King in his bench, but the pleas in B. R. are held coram Rege ubicunque fuerit in Anglia, and so is a Court removeable, viz B. R. and by the statute of Magna Charta C. B. teneantur in loco certo, then it is contrary to the oath of the Justice of the one Court and the other; for the one is certain, and the other is uncertain. Br. Commissions, pl. 25. cites 5 M. 1.

3. The making a Justice of C. B. a Justice of B. R. determines and drowns the inferior authority of being Justice of C. B. And it is impertinent, that one may reverse his own judgment, as in this case he might by error brought in B. R. but the same person has been Justice of C. B. and Chief Baron of the Exchequer, as Brooke was in the time of H. 8. and Starkie in H. 7th's time. Held by six J. against two. D. 158. b. pl. 34. Pasch. 4 & 5 P. & M. Dyer's Case.

S. P. and held accordingly. Cro. C. 128. Mich. 4 Car. B. R. Sir Geo. Crook's Case; but for better security a patent of revoca-

tion was made according to a precedent of Justice Jones's patent, when he was removed out of C. B. to be Judge in B. R.—And though the constituting him Justice of B. R. was intended only *pro illa vice*, and that he surrendered it the next day, yet the first patent is thereby determined. Br. N. C. 5 Mar. 1. pl. 498.—Br. Commissions, pl. 25. cites S. C.—Jenk. 214. pl. 53.—But a man may be Justice of C. B. and Justice in *oyer and terminer*, or of *gaol delivery* simul & semel; for none of those Courts have controlment of the other. Br. N. C. 5 Mar. 1. [ 133 ] pl. 498.—Br. Commissions, pl. 25. cites S. C.—Knevit was Chief Justice and Chancellor together in the time of E. 3. D. 159. pl. 35. marg.

4. King H. 7. made R. B. Remembrancer in the Exchequer by patent for life, to be occupied by himself or his sufficient deputy; afterwards King H. 8. made B. Third Baron of the Exchequer, the patent of which was, *quamdiu se bene gesserit in the same office of baron*. About four years afterwards the King granted a patent of the said office at the request of B. to the son of B. *pro termino vite habend. immediate cum primum & proximo post mortem dicti B.* (the father) *fursum redd. vel dimission. seu aliquo modo quocunque & quandocunque vacare contigerit*: And because those letters patents were insufficient and void, in as much as the said R. B. had no legal estate at the time of making thereof, nor at any time after that he was constituted third baron &c. Scire Facias issued for the King into Middlesex, to annul and revoke the said letters patents &c. and upon Sci. Fa. returned and default made, the judgment was given accordingly. D. 197. b. pl. 47. Pasch. 3 Eliz. Blage's Case.

Roll. R. 452. cites S. C.—1 Jo. 295. cites S. C.

5. Diverse offices have been seized, because a man had *so many, quod eis intendere nequit*; per Noy attorney-general, and judgment accordingly. Jo. 295. 8 Car. in Itin' Windsor, Sir Charles Howard's Case.

6. Whether the same person may be Mayor and Town-clerk of the same vill in which the Mayor is Judge of the Court of Record? was the question. The Court seemed to think he could, but delivered no opinion. Sid. 305. Mich. 18. Car. 2. B. R. Verrior v. the Mayor of Sandwich.

7. Chief Justice cannot be Prothonotary of the same Court, or Clerk of the papers, though he may dispose of them; Arg. which the Ch. J. affirmed. Sid. 305. in Case of Verrior v. the Mayor of Sandwich.

A Judge cannot be an officer. Roll. R. 452. cites D.

115. 3 Mar.—Jo. 295. S. P.

(S) *Assignable.* In what Cases.

Br. Grants, 1. *Office of\* trust* cannot be assign'd over, unless it be granted to have to *him and his assigns*. Br. Patents, pl. 66. cites S. C.—

\* S. P. Br. 11 E. 4. 1.

Grants, pl.

108. cites 21 E. 4. 20.—The office of *Chamberlain of the Exchequer* is granted to A. and his assigns. A. may assign this office, but not make a deputy without special words to enable him. Jenk. 141, pl. 89. cites 11 E. 4. 1. By all the Judges in the Exchequer.

Vaugh. 181.  
cites S. C.

2. The office of *Filazer* is an office of personal trust, to do the business of the Court, and not assignable, nor can execution be upon it. Per Shelley, D. 7. b. pl. 10. Pasch. 28 H. 8. Anon.

3. Office of being *Carver at my table* cannot be assign'd. D. 7. b. pl. 10. per Shelley.

4. All *offices of trust*, as *Steward, constable, bedelary, bailiffwick*, must be personally occupied, unless they be granted to be occupied by a deputy, and are not assignable. Vaugh. 181. Mich. 20 Car. 2. in Case of *Bedell v. Constable*, says Littleton, S. 379. is expressly so.

5. A man's *bailiff* or *receiver* are offices of personal trust, and not assignable; so is the office of every *servant*. Vaugh. 182. ut sup.

[ 134 ] (T) *Actions.* Deputy and Principal. In what Cases Actions lie against the Deputy, and in what against the Principal.

S. P. per  
Holt Ch. J.  
11 Mod 17.  
Mich. 1  
Annæ, B.R.  
in Case of  
Lane v.  
Cotton.—

*As a bailiff*

1. A *Servant* or *Deputy*, quatenus such, can't be charged for *neglect*, but the *Principal* only shall be charged for it; but for a *misfeasance* an action will lie against a servant or deputy, but not quatenus a deputy or servant, but *as a wrong-doer*. Per Holt Ch. J. 12 Mod. 488. Pasch. 13 W. 3. Lane v. Sir Robert Cotton.

2. The *reason* why a principal shall answer for his deputy is, because as he as principal has power to put him in, so he has power to put him out, without shewing any cause, and that tho' he had expressly given him an *estate for life* in the deputation. Per Holt Ch. J. 12 Mod. 488, 489.—cites Hob. 13.—Mo. 856.—39 H. 6, 34.

(U) *Remedy*

(U) *Remedy to recover, or be admitted into Offices.*

1. 13 E. 1. **G**IVES assise of novel disseisin for bailiwicks and *Assise is*  
*cap. 25. other offices in fee, and that in such cases the writ* given of an  
*shall be (as in other cases) de libero tenemento.* office by  
the statute,  
because, as

some thought, office was not accounted franktenement at common law, and by some for hasty remedy. Br. Precipe, pl. 19. cites 10 Aff. 11.

This statute as to the offices, was but a declaration of the common law, and to remove a doubt which then was, and so the words therein (*jacet de cætero &c.*) are to be intended, that *jacet de cætero absque difficultate*. 8 Rep. 47. b. in Jchu Webb's Case.—And made herein in affirmance of the common law, altho' it mentions offices in fee only, yet such as have offices in tail, or for life, shall have an assise; and tho' the words of the act are general, yet the act is to be intended of offices of profit, and not of offices of charge, and no profit. But it extends to offices in the Admiral Court, Ecclesiastical Court, or any other Court where either the civil or ecclesiastical law, or any other law than the common law &c. of England doth rule, as well as to offices in Temporal Courts, which are governed by the common law. 2 Inst. 412.—8 Rep. 47. a. b. cites abundance of Cases in Jchu Webb's Case.

If a man be disseis'd of the whole office, he shall have an *assise de officio cum pertinentiis*. And albeit the statute speaketh de officiis, yet if it be disseis'd of parcel of the profits, he may have an assise of that parcel. 2 Inst. 412.

The office must be in certo loco, which is to be so understood, as tho' the office be removable, yet it must be in certo loco, when the assise is brought. 2 Inst. 412.—S. P. for the clause of (*de proficuo in certo loco capiendo*) extends to covevers &c. and not to the clause of offices. 8 Rep. 47. b. in Jchu Webb's Case, cites 4 E. 4. 2.

2. A writ of entry in the *Quibus* lies upon disseisin of an office.  
F. N. B. 192. (E.)

3. If an office extends into diverse towns, hundreds or counties, it is an office for which an assise lies of the profits, by the stat. West. 2. where note, if an office extends into diverse villis or counties &c. an assise lies for the profits in any vill or hamlet where the grantee is ousted; for the profits are things severable.  
F. N. B. 179. [416.]

4. If one be sheriff or bailiff of an hundred, or manor, for life, [ 135 ]  
if he be ousted of the office, he may have a writ or plaint within the shrievalty or bailiwick of such county, city, hundred or manor without shewing in which of the villis, because well known. Ibid.

5. But if it be for the bedelry of an honour &c. there he ought to bring his writ in all the villis where the office extends. Also in the former case, the hundred or county (city) shall be put in view; see these books. 16 E. 2. Aff. 370. 18 E. 2. Aff. 377. 8 E. 3. 56. F. N. B. 179. [416.]

6. If the King grants 6 d. on each sack of wool within the county of York, the grantee shall have an assise of the profits in any particular place within the county where he is disturbed. F. N. B. 179. [416.]

7. But if he brings an assise of the office, the whole county shall be put in view as in the principal case [which see at (W) pl. 2. NORRIS v. CONISBROOK.] was held, seeing the office there extended into diverse counties, (for 'twas averr'd to be within the liberties of London &c.) therefore the assise for the office should be brought in consilio comitat. but for the profits it may be brought in any place or vill where the disseisin is. F. N. B. 179. [417.]

8. *But then how shall it be in case the office extends throughout England; and it seems to be most reasonable, that the office should be severable, because it does not charge the land, but only respects the person; and therefore he may also have an assise of his office in whatever place he is disseised; as suppose he disseised him of his office of measurer in such a town &c. see there the Case of the Usher of the Exchequer. 22 H. 6. 10, 11. Et postea partes cohcordaver. See an assise of the office of Filacer, and the post put in view. Dyer 14. DAUX's Case; and if it be an office concerning land, it seems he ought to name the tenant of the soil. 8 E. 1. Ass. 285; F. N. B. 179. (K) in the notes there (a), and in the new page 417.*

9. *A. and B. being under-wardens of the Fleet, granted the office of Clerk of the Fleet prison to J. S. on his payment of 900 l. to them, and giving 2000 l. bond for the faithful discharge of his office. The under-warden's place came afterwards to D. who seised the books and papers of J. S. relating to the clerk's office, and granted it to W. R. Upon a bill by J. S. it was decreed that he be restored to the office, and to have an account of the profits since his being turned out; but the plaintiff's title (which was controverted by the defendant's) was not to be better'd by the decree, nor is he to be reliev'd thereby against damages which W. R. may recover; and the 2000 l. bond to stand as a security to W. R. to indemnify him against any damages he hath, or may suffer, by any act of the plaintiff by reason of his said office. Fin. R. 50. Hill. 25 Car. 2. 1673. Meakin v. Witchcott, Duckenfield & al.*

10. *The Marshal of B. R. having not attended for 2 terms, another was sworn into his place; but (as the Court declared) without prejudice to his right to the office; for that was left to the law. The new marshal, to get possession, made a forcible entry into the prison; and a motion being made, that the Court, in regard of the power they had over their officer, would interpose and quiet the possession till the title be legally settled, and the rather, because it would look disrespectful in him to apply to an inferior jurisdiction to have an inquisition of forcible entry; and that the Justices of the Peace would hardly dare to meddle with it, by reason of its immediate dependency on this Court. But the Court said there could be no disrespect in using the remedy the law gives; that this would be to hold plea of forcible entry by parol, whereas B. R. has no original jurisdiction of forcible entry, and currat lex; for it is a question of right between two contending officers. 6 Mod. 91. Hill. 2 Annæ. B. R. Sutton's Case.*

11. *A. being in possession of the office of Clerk of the Crown &c. in B. R. by the death of one former grantee, and the surrender of the other, solicited a new patent, and therein to add the life of B. to that of his own, and the patent to be made Tenendum by B. or deputy, during his life after A's death; and takes a note from B. in the mean time, promising to execute a declaration of trust, and declaring that his name is us'd in trust for A.*

*his*

According to the state of the case the surrender was previous to A's  
[ 136 ]  
entry into, and enjoy.

*his executors and assignees.* The patent was afterwards had. A. died very much in debt, and without ever calling on B. for a declaration of trust. The Master of the Rolls (before whom this Case was first heard) thought that B. was intitled to this office in his own right, and not as a trustee, notwithstanding such note; that considering that an office relating to the administration of justice, and particularly this of the Crown Office, highly concerns the Public as to the due execution thereof, and that such office is not to be considered as the private property of the person enjoying it, independently of his skill and integrity in the discharge of his duty; and therefore such grants being made upon this foundation, the *Crown ought to be privy to any trust to be declared by the grantee*, and the ability and integrity of such cestuy que trust be known and approved: besides he thought the note could not be construed as a present declaration of trust, but refer'd to a future act. And that the insolvency of A. could not affect a matter of this consequence, in which the Crown and the Public must be considered prior, and preferable to the case of Creditors; and so dismiss'd the bill brought against B. But upon a re-hearing before the Ld. Chancellor, his Lordship thought the note proper for a present declaration of trust; and that it ought to be carried into execution: that all trusts relate to some future act to be done, and this does no more. And so reversed the decree; but order'd the Master to make B. a liberal allowance. Cases in Chan. in Lord Talbot's time. 97. Trin. 9 Geo. 2. *Bellamy v. Burrow.*

ment of office; but page 107. it seems by what Lord Chancellor says, that A. was in the office prior to the surrender, and had it for his own life, and the life of the surrenderor, in whole stead a grant was obtain'd for B's life.

### (W) Remedy for Recovery of, or to be admitted to Offices. *Count.*

1. **A** N assise was brought de libero tenemento of the office of *Filacer*, and the plaintiff made his title in his *plaint*, and alleged the custom for the *Chief Justice to grant, &c.* and that *B. Ch. J.* granted it to him when the office was void; that he was admitted and sworn, and had seisin by taking 3 d. for a *capias* in a plea of trespass against C. D. and the place where the plaintiff sat upon his admission to the office was put in view. But having been admitted *Filacer*, he was put out of his office by the Court for absenting himself, and letting his office to farm, without licence of the Court, and one of the defendants was put into his place; but no record made of it, nor was he called to answer for himself: but the *Ch. J.* discharged him ex assensu sociorum suorum by parol, openly in the Court, calling the now plaintiff to him; and this being well prov'd, was a good discharge, and no cause of assise. D. 114. b. pl. 63. Pasch. 2 and 3 P. & M. *Vaux v. Jeffern, Lynton and Keeble.*

S. C. cited 8 Rep. 47. b. in John Webb's Case. Hard. 127. Arg. cites S. C. and says that the refusing to let this matter be inquir'd of was, because the Court having determined the matter of fact, this was rather a point of trial than

a judgment, and therefore shall now be inquir'd into,

2. An assise was brought in Middlesex of the profits of the office

*office of packing wools &c. within the liberties of London, granted by the King, by NORRIS v. CONISBROOK, and 'twas agreed; 1. that the plaint in an assise shall never abate for want of form; and therefore, tho' the course is an assise of office or corody, or common apprender, &c. to shew the disseisin, and then the title; yet if he shews the title and then the disseisin, it shall not abate.* 9 E. 4. 6. But in those cases *where he makes title in his plaint,* (as regularly he ought to do in an assise of office, corody &c. (yet see *Rast*, Entr. 75. Hors de son fee, pleaded in part of an assise of rent. 15 E. 4. 24. or of land, 40 E. 3. 38.) *there he ought to make his plaint to pursue his title, as if a grant be made to have the surveying and packing of all cloths which should go beyond sea, he ought to shew that those cloths of which he was ousted the surveying, were cloths to go beyond sea.* 2. He who

[ 137 ] *makes a plaint in an assise of office, need not be so precise in setting out his title, as if he was to sue against the King by petition; for one need not make so exact a title against perners of profits, as against a tenant; and therefore he need not shew who had the office before, or that it was an ancient office.* 9 E. 4. 11. And yet if it was not an ancient office, it ought to be created and granted by the word *Constituimus &c.* 8 E. 4. 6. F. N. B. 179. (K) in the notes there (a), in the new page 416.

\* 8 Rep. 47.  
b. in Jehu Webb's Case. cites 27 H. 8. 12. and 31 E. 1. Tit. Ass. 440. and 21 E. 3. 4. b.—1 Inst. 412. cites the same

3. If one makes a plaint of an office, he *need not shew that it is an office of profit, or that fees belong thereto*, 8 E. 4. 22. and yet \* if it be only an office of charge, an assise does not lie thereof, 27 H. 8. 38. but if he be ousted by a pernor, he has his remedy by some original writ, according to his Case; and so 'tis in case of a corody, F. N. B. 179. (K) in the notes there (a), and new page 416. cites 17 E. 2. Nuper obiit 12. in the Case of Const. 27 H. 8. 12. 4 E. 3. Brief 736, 793, 794.

Cases.—A. brought assise of the office of Master of the Tennis Plaies of the King in Westminster &c. Exception was taken to the plaint, because it says that the office aforesaid is an ancient office in Westminster aforesaid; and that the King by his letters patents granted &c. but did *not shew that any profits belong'd to the said office*; and that a man shall not maintain an assise of office without profit, according to 27 H. 8. 12. But resolv'd that the plaint was good enough; for true it is, that of an office of charge no assise lies, as is held in 30 Ass. 4. 8 E. 4. 22. and 27 H. 8. 12. and that 30 Ass. 4. was assise brought of the office of Messor of the manor of D. cum pertinentiis; and there Shard took a diversity between an ancient office and a new office; for in an assise of a new office the plaintiff ought to shew what fee or profit is granted for the exercise thereof; because it cannot have fee or profit appurtenant thereto, as an ancient office may. And the plaintiff had judgment. 8 Rep. 45. b. 49. a. b. 50. Mich. 6 Jac. C. B. Jehu Webb's Case.

S. P. 8 Rep. 49. b. cites 21 H. 6. 11. b.—\* 8 Rep. 49. b. in Jehu Webb's Case, cites 30 Ass. 4. S. P. by Burton; and that in such case the writ shall abate; for by the recovery of

4. If he be ousted of the office, then the assise shall be brought of the office, *cum pertinentiis*; for if his plaint be \* of the office and of the profits thereof, he makes his claim of one thing twice, and therefore his plaint shall abate, 8 E. 4. 22. agreed; and so is 30 Ass. 4. for the office of † Metor. 2. If one be ousted of parcel of the profits of his office, this may be alledged to be an ouster of the whole office, if the party will, 5 E. 4. 8. per Cur. But if he will, he may make his plaint only of the profits of his office, and if he be ousted of parcel of the profits, he may have an assise of those profits: so \* if one has a corody de pane & servicia, if he be ousted of only part of the bread &c. he shall have an assise of the

the whole quantity of bread for the necessity, but he need not bring an assise of his corody. 22 H. 6. 10. 3 E. 3 Aff. 175. 13 E. 3. Plaint 23. 11 Aff. 22. 30 Aff. 4. And so note a *diversity* between a thing *severable* and *entire*. F. N. B. 179. (K) in the notes there (a), and in the new page 416.

the office, the fee and profit, as parcel thereof, shall be recovered: and says, that with

this accords 8 H. 4. 22. b. where in assise of an office in C. B. he made his *plaint of the office, and fee, and wages, and commodities*; and exception being taken because it was demanding the same thing twice, the plaintiff said he had amended his plaint; for it is no other but of *the office of cum pertinentiis*; and tho' Pigot said that then the plaint is not good; because a man shall not maintain assise of an office without profit; yet the Court as to this held the plaint good. And with this accords 5 E. 4. 3. 22 H. 6. 9. b. 9 E. 4. 6. a. b. —† The year-book is (messor.) As to his office, see Fleta 172. lib. 2. cap. 84. —‡ And if he be disseised of all the bread, he shall not plead of the ale; and if he does, his plaint shall abate. 8 Rep. 49. b. 50. a. cites 3 E. 3. Assise 175, by Scroope.

## (X) Pleadings.

See (O. 2)

1. **A** Nnuity demanded by office of Parkership granted to him for life, the defendant said that the office was granted to the plaintiff *ut supra*, and that such office had been time out of mind; and that the keepers had the keeping of the deer and the wood for the same time, and that from the 2d day of July till the 14th day of the same month, 22 savages were killed by persons unknown, in negligence of the plaintiff. Arderne said that more is in the plea than need to be, viz. that the keepers had the keeping the deer and the wood in park. For this is intended in the law; 'twas held that neglexit custodire is no good issue; for neglexit is a denial. Young, he did not keep the park for 12 [ 138 ] days *ut supra*. Per Danby, this is the better pleading. Br. Forfeiture de Terres, pl. 54. cites 5 E. 4. 26.

2. When one prescribes to have an office, and the profits thereof, he ought to shew it to be an ancient office. Cro. J. 605. Mich. 18 Jac. B. R. in Case of Dawney v. Dee.

Where one claim'd the office of a surveyor by grant from

the predecessor bishop in fee, and averred that the same was *antiquum officium*, it was held naught; because he claim'd the office itself by prescription: so if one be impleaded in a quo warranto for the park itself, it is no plea to say that it was *antiquus parcus*, but he must plead a prescription for the park. But where another thing is claim'd as incident to the same, it is otherwise; as where a keeper claims profit of a park by prescription, he alleges not a prescription in the park, but *antiquus parcus* generally; Hob. 44. in Case of Cowper v. Andrews. — 10 Rep. 59. b. Trin. 11 Jac. The Bishop of Salisbury's Case.

[For more of Officer and Offices in general, see Actions, Assise, Stewards, and other proper Titles.]

## One Entire Conveyance.

(A) *What is; tho' done at several Times, or consisting of several Parts.*

1. IF a man has a manor to which an *advowson* is *appendant*, and he makes *feoffment of an acre, and afterwards in the same deed grants the advowson*, this makes the *advowson* in gross; otherwise it would be if the *feoffment* was made of the entire manor. Per Shelly, J. D. 48. b. pl. 3. Pasch. 33 H. 8. Anon.

Mo. 667.

S. C. —

Yelv. 23.

S. C. affirmed in error. — There may be several deeds

2. One note of 40l. by which A. acknowledges to have received so much of B. to the use of C. and D. and to repay &c. is as several bills to C. and D. in one deed, and as divided debts, and they may sue severally for 20l. Cro. E. 729. Mich. 41 and 42 Eliz. C. B. Shaw v. Sherwood, als. Norwood.

contained in one piece of parchment. Arg. Cart. 143. cites Matthewson's Case.

3. The condition of a bond, and the bond, are but one deed, and the date of the one is the date of the other. Cro. E. 732. Mich. 41 and 42 Eliz. Forth v. Harrison.

Ow. 126.

S. C.

4. *Fine sur consufance* &c. come *ceo* &c. the *consufee* renders to another in tail, reserving rent, and by the same fine grants quod *tencementa prædicta integre remanebunt* to the *consufor* and his heirs; resolved that 'tis a reversion; for being one fine it enures as if it had been at several times, and shall be intended as rendering the tail at one time, and the reversion at another time; and so is the usual course of fines, and so it has been always expounded: but 'tis not so in grants by deed. Cro. E. 792. Mich. 42 and 43 Eliz. C. B. White v. West, alias Gerish.

S. C. cited 4 Mod. 176.

in Lord Derwentwater's

Case. —

2 Roll. R.

245. Far-

rowes and

Curfon v.

Farmer and

Ferrers. —

Cr. J. 643.

S. C. —

5. *Bargain and sale, recovery and fine*, tho' made at several times, yet they all, by the mutual agreement of the parties, make but one assurance of one and the same manor, according to one and the same original bargain and contract; and therefore, every one of them tending to perfect the same bargain, none of them shall destroy any part of it, or subvert the true intention of the parties in any thing, but shall be taken as one assurance, made at one and the same time. 2 Rep. 75. Hill, 43 Eliz. C. B. Lord Cromwell's Case.

[ 139 ] S. C. cited 2 Mod. 234. 235. — Mo. 616. Bullock v. Thorne and Standen. — Mo. 718. Bridges's Case. — Per Trevor Ch. J. 11 Mod. 184. in delivering the judgment of the Court, in Case of Abbot v. Burton. — G. Equ. R. 17 Pasch. 8 Annæ. Lord Atham v. Lord Anglesey.

6. A. made a *feoffment* to B. and C. on condition to *infeoff* J. S. the deeds were all ready to be deliver'd at the same time; but it happened that B. and C. delivered their deed first to J. S. before A. had delivered his to B. and C. and in B. and C.'s deed was a letter of attorney to one to make livery. A. delivered his deed, and afterwards livery was made by virtue of the letter of attorney. Adjudg'd, that the livery was void, because B. and C. had then nothing to pass. Cited 2 Bulf. 304. Hill. 12 Jac. Per Coke Ch. J. as Ld. Dacre's Case.

7. A deed declaring the uses of a *fine*, which was then covenantant to be levied, and the *fine* tho' levied several years after, are but one assurance; per Croke and Montague; for the execution of all things executory respect the original act, and shall have relation thereunto, and all make but one act, tho' done at different times. Cro. J. 510, 512. Mich. 16 Jac. B. R. Hargill v. Hare.

S. P. agreed the deed and fine being between the same parties and concerning the same lands. —4 Mod. 265. Pasch.

6 W. & M. B. R. in Case of Jones v. Morley.

8. If a *proviso* be put in after the *In cujus rei testimonium*, and subscribed to the deed before the sealing of it, this is then part of the deed; if it be after the sealing, yet it may be as a condition annexed to the deed; per Doderidge J. 3 Bulf. 302. Mich. 1 Car. B. R. Thompson v. Butler.

9. Three several leases by a copyholder in fee to another for one year each, but two days to intervene between the determination of the first, and the commencement of the second, and so between the second and the third, being all made at one time, shall be intended one intire contract. Arg. and seems admitted. Cro. C. 234. Mich. 7 Car. B. R. in Case of Matthews v. Whetton.

10. A *feoffment* first, and afterwards a *fine* by tenant in tail, make but one assurance, and does not operate by way of release or confirmation only. Cro. C. 321. Mich. 9 Car. B. R. King v. Edwards.

*Fine and feoffment* to the same person and uses, tho' made at several times, yet are but one conveyance.

2 Lev. 54. Trin. 24 Car. 2. B. R. Whaley v. Tancred. —Mod. 252. Trin. 29 Car. 2. C. B. in Case of Addison v. Otway. —D. 157. Putnam v. Duncomb.

11. Surrender and admittance to a copyhold shall be accounted one intire act, contrary to other learnings. Arg. Sti. 146. Mich. 24 Car. in Case of Barker v. Denham.

12. A deed and a will construed and decreed to be as one intire provision, and limitation, how portions shall be raised, and at what time paid. 2 Chan. Rep. 1. 20 Car. 2. Every v. Gold.

Decreed that a deed and will make but one will. Per Jeffries

C. 2 Ch. R. 296. 36 Car. 2. Woodhall v. Benson.

13. Tho' the limitations of the trust of an inheritance and of a term are by several clauses in the deed, yet all must be taken as one intire conveyance; per Cur. Vent. 195. Pasch. 24 Car. 2. B. R. Sir Ralph Bovey's Case.

14. Hale

3 Bulf. 256.  
per Mount-  
ague Ch. J.

14. Hale said, that in 1646, a *lease for years* was assigned, and the *trust of it entail'd*, and *two days after* the trust of the *inheritance entail'd* in the same manner; and it was held by the best counsel then in England, that tho' this was done by *several deeds*, and at *several times*, yet being in *pursuance of one agreement*, all this was to be taken as one intire act according to the Case of 17 Jac. where a fine was levied to the lessee for years, with intent that he should suffer a recovery, which was had the Term following, and resolved that this Term was not drowned. Vent. 195. in Case of Sir Ralph Bovey.

[ 140 ]

See Chan.  
Cases 7.  
Hill. 13 &  
14 Car. 2.  
in Case of  
GORING v.  
BICKER-  
STAFF,  
where it was  
held by the  
Master of  
the Rolls,  
that two  
deeds of the  
same date  
executed at  
the same  
time, and  
touching the  
same thing,  
are to be  
taken as one  
assurance.

15. A deed of trust, a jointure deed, and articles, being all of the same date, were intended to be executed at the same time, and to be all as one intire agreement; and therefore a recital in the jointure deed, that it was in consideration of marriage, and of 4000*l.* paid or secured to be paid, as the portion &c. could not be understood as any positive agreement for 4000*l.* the said articles containing a covenant for payment of 2500*l.* part of the 4000*l.* (the other 1500*l.* being actually paid) and that the same should be paid to the husband (the plaintiff) or his assigns, within six months next after such purchase, and settlement as made therein was agreed, and which was to be within four years after; but the wife dying within one month after the marriage, and the husband exhibiting his bill for the remaining 2500*l.* the Ld Chancellor, assisted by Rainsford J. dismissed the same; for the said recital, as to the 4000*l.* consideration, must be expounded by the articles, to which it does in a manner refer, and consequently the husband not intitled to the said 2500*l.* Fin. Rep. 98. to 102. Hill. 25 Car. 2. Cheek v. Ld Lisle and Harvey.

2 Rep. 74.  
in Lord  
Cromwell's  
Case.

16. A condition or power may be annexed to an estate by a *distinct deed* from that which conveys the estate, but not unless both are sealed and delivered at the same time, and so they are but as one deed. Arg. Vent. 279. Hill. 27 & 28 Car. 2. B. R. in the Earl of Leicester's Case.

2 Lev. 149.  
S. C. by the  
name of  
Wigton v.  
Garret.—  
But had the  
fine preceded  
the deed  
which de-  
clared the  
uses, the  
fine had ex-

17. A power was reserved to *revoke by indenture subscribed and sealed* with his hand and seal, and witnessed by three witnesses. He covenants by a deed sealed and subscribed as aforesaid, to levy a fine to other uses, and after the covenant a fine was levied accordingly; tho' it was insisted that the deed was made in one year, and the fine levied in another, yet per tot. Cur. the deed and fine taken together were resolved to be a good execution of power. Vent. 278. Earl of Leicester's Case.

extinguished the power, and the deed had come too late. Adjudged by three J. against one. Vent. 368. 371. Herring v. Brown.—Cumb. 11. S. C.—But adjudged contra by six J. and that judgment reversed; because the cognitor from whom the estate first moved was more than an ordinary tenant for life, and had an *authority vested with an interest*, and his conveyance was voluntary, and deeds are to be governed by intention of parties. Carth. 23. S. C.—The deed that comes after shall be coupled with it, and be accounted but one act. Mich. 1691. Arg. Ch. Prec. 14. cites it as adjudged.—Parl. Cases 143. S. C. cited in Case of Morley v. Jones.—\* Per Hale Ch. J. Vent. 250, in the Earl of Leicester's Case.

18. *A fine and recovery and deed to lead the uses* are but one conveyance; per Holt Ch. J. 2 Chan. Rep. 434. in Case of *Ld Montague v. Ld Bath*.

Deed of uses and a fine by an infant make but one assu-

rance; per Seroggs. Mod. 252. Trin. 29 Car. 2. in Case of *Addison v. Otway*.—For otherwise he might avoid it as he may a deed by infancy. 2 Mod. 233. in marg. of S. C.

19. *Lease and release* are but in nature of one deed; per North Ch. J. 2 Mod. 252. in Case of *Barker v. Keat*.—The release does not merge but enlarges the interest granted by the lease. Arg. Farr. 74. in Case of *Shortridge v. Lamplugh*.

20. Where an act is *wholly imperfect* of itself, but is to receive its perfection from a subsequent act, there of necessity they must be taken as one intire conveyance; as a covenant to suffer a reconveyance, or levy a fine; when it is done it is but one conveyance, so is a *covenant for further assurance, and assurance after made*. And there is no incongruity, that an imperfect thing should wait for its perfection from a subsequent act; for *nothing passes in the mean time*; and so is *SEYMOR's Case*. 10 Rep. Skin. 186. Trin. 36 Car. 2. C. B. *Herring v. Brown*.

But where the first act is of sufficient ability to pass an estate, the law will not expect a future act, tho' to some collateral purposes it would pass

it stronger; as in *SEYMOR's Case* likewise. Skin. 186. *Herring v. Brown*:

21. *Demise and re-demise* are but one conveyance in the law. Arg. N. Ch. R. 169. Mich. 1690. in Case of *Baden v. the Earl of Pembroke*.

22. A *statute* and a *mortgage* were enter'd into for securing payment of legacies charged on lands, to be settled by marriage articles &c. but it was *indorsed on the mortgage*, that the same was to be void unless the wife's estate (who was then an infant) was settled on the husband for life. It was held that the *indorsement on the mortgage* was sufficient to discharge the statute and articles also, all being *executed at one and the same time, having the same witnesses, and being part of the same agreement*, and all to be look'd upon as but one conveyance. 2 Vern. 457. Hill. 1703. *Laurence v. Blatchford*. [ 141 ]

23. A *bond* was enter'd into by *A. to B.* for his son's fidelity as an apprentice, and a *covenant from B. to A.* that the son should account monthly. Per *Ld. Wright* this ought to be taken as one agreement. 2 Vern. 519. Mich. 1705. *Mountague executor of Ewer v. Tidcombe and Hoskins*.

24. *Fine and recovery* to the use of himself for life, remainder to his 1, 2, &c. sons in tail, remainder to the right heirs of the feoffor. The lands descended a parte materna. The fine and recovery are to be taken as one entire conveyance, consisting of these several parts, and directed as to the use of them by the same covenants; and the heir a parte materna shall, on the decease of conusor without issue, have the estate, being the ancient use. 2 Salk. 590. Trin. 7 Ann. C. B. *Abbot v. Burton*.

[For more of **One Entire Conveyance** in general, see **Power (C)** pl. 2, and other proper Titles.]

**Oppression.**

## Oppression.

(A) *What is.* How it must be set forth, and in what Cases relieved.

1. **I**T was agreed by the Ld. Keeper Coventry and the whole Court, that if a man did exhibit a bill against another for oppression, and layeth in this bill, *that the defendant did oppress A. B. and C. particularly, and an hundred men generally*; that the plaintiff by his witnesses *must prove that the defendant hath oppressed A. B. and C. particularly*, and shall not be allowed to proceed against the defendant, upon the oppression of the others laid generally, before his particular oppression of A. B. and C. be prov'd. *But if the charge laid be general and not particular*, as if the plaintiff in his bill saith, *that the defendant hath oppressed an hundred men generally*, there he may proceed and examine the oppression of any of them. Godb. 438. pl. 583. Mich. 4 Car. in the Star-Chamber. Floyd and Sir Tho. Cannon's Case.

2. Also in every oppression there ought to be a threatening of the party; for the voluntary payment of a greater sum where a lesser is due, cannot be said extortion. And afterwards the bill was dismiss'd for want of proofs ex parte querentis. Ibid.

3. Costs were taxed at law, upon a judgment to 15*l.* But a rule was made upon motion, that if defendant paid the costs taxed, no execution should go out; but because the costs were not speedily paid the plaintiff at law took out a Fi. Fa. and levied at one time 23*l.* and afterwards 65*l.* more, which being oppression, the defendant at law, but plaintiff here, exhibited his bill to be relieved; and the Court decreed the defendant to repay whatever he had levied upon the plaintiff more than the 15*l.*

[ 142 ] for the costs taxed by the secondary, and that the Master tax the plaintiff's costs to be paid by the defendant. Fin. Rep. 87. Hill. 25 Car. 2. Sowton v. Spry.

[For more of Oppression in general, see Extortion, and other proper Titles.]

Other Action pending.

(A) *What shall be said other Action pending.*

1. **I**N attaint the tenant pleaded, that her baron, party to the writ, died 27 September, judgment of the writ, the plaintiff said that he was alive, and they had day crastin' purific' and at the day the plaintiff confessed that the baron was dead, by which the writ abated, and mesne between the day of the death of the baron and crastin' purific' the plaintiff brought other attaint against this feme sole, and she pleaded that it was purchased pending the first writ, and because the judgment of the abatement of the first writ has relation to the day of the death, therefore the 2d writ is good, which was purchased before the judgment; for the first was abated in law before. Br. Relation, pl. 9. cites 12 E. 3. 16.

2. *Præcipe quod reddat*; at Nisi Prius, the \* defendant was consulted and purchased a new writ bearing teste mesne between the day of Nisi Prius and the day in Bank, and this was purchased pending the first writ, and therefore was abated, notwithstanding the judgment given at the day in Bank; for it shall not have relation to the Nisi Prius. Nota. Br. Brief, pl. 44. cites 40 E. 3. 38.

3. Formedon against baron and feme and two others who pleaded to the writ, that the demandant at another time brought scire facias against the feme and the 2 when the feme was sole, and so this writ purchased pending the other, judgment of the writ; and because by the taking of the baron by the tenant, the first writ was not abated any more than by feoffment made by the tenant to another pending the writ, therefore the [second] writ was abated by award, notwithstanding that the baron was not party to the first writ. Quod nota per judicium. Br. Brief, pl. 45. cites 40 E. 3. 44.

4. A man may have two writs of trespass pending together. Contra of debt and præcipe quod reddat. For one may do divers trespasses in one day; but in action for debt or land it appears to be one and the same thing upon the averment &c. Br. Brief, pl. 17. cites 9 H. 6. 50.

5. Formedon of land; the tenant said, that the demandant had brought formedon of 10 l. rent, which is issuing out of the same land, judgment of the writ; and a good plea, per Brian Justice; for he cannot have the land and rent also out of it; by which the demandant said, that the rent was issuing out of other land &c. Br. Brief, pl. 311. cites 3 H. 7. 3.

6. In Case the plaintiff declar'd, that whereas 16 December, at the request of the defendant, he deliver'd to the defendant 100 l.

\* It should be (plaintiff)  
—Br. Journe,  
pl. 13. cites  
S. C.—Br.  
Nisi Prius,  
pl. 5. cites  
S. C.

to the use of the defendant's father, the defendant promis'd to repay it at or before the first day of May next ensuing. The defendant pleaded in bar, that plaintiff had brought account against defendant for the same money, and counted of money bail'd 10 December, to which defendant tender'd his law, and defendant averr'd that it was brought for the same money and pray'd judgment, and adjudged no plea in bar. And in error brought in B. R. Popham [ 143 ] was at first against the judgment, but afterwards the judgment was affirmed, because damages are recoverable in Case, but not in Account; and Popham mutata opinione agreed to the judgment. Mo. 458. Mich. 38 & 39 in C. B. and Pasch. 39 Eliz. B. R. Bankby v. Foster.

Noy. 131.  
S. C.

7. A. leased to B. for 21 years, and afterwards leased the same to B. for life, by the words *Dedi, concessi, dimisi, & ad firmam tradidi*. B. enter'd, and C. ousted him. B. brought *warrantia charta* in C. B. and afterwards (the action in C. B. yet pending) he brought an action of covenant in B. R. The defendant pleaded this, and the plaintiff demurr'd and had judgment; for these actions are of several natures. The first is *real*, and shall bind the land which the lessor had at the time of the judgment; the other is *personal*, and in that he shall have only damages. Yelv. 139. Mich. 6 Jac. B. R. Pincombe v. Rudge.

8. If in action sur case, the plaintiff lays two considerations where there is but one, or vice versa, and it is found against him, he can't be barr'd in a new action. Roll R. 392. Trin. 14 Jac. B. R. per Coke and Doderidge, in Case of Paine v. Sell.

9. Two actions were brought at the same time for *shevvaage*. In one the plaintiff prescrib'd for 2d. per 100 to be paid *per alienigenas*; and in the other the prescription was laid for payment of the same duty *tam per indigenas quam per alienigenas*, and the defendant averr'd that both were for the same duty, and so plead-ed the one in abatement of the other mutually; and so they were both abated. Freem. R. 401. Trin. 1675. The Mayor and Commonalty of London v. B.

### (B) Pleadings of other Action pending of a superiour Nature.

1. **I**N *assise* it was agreed that it is a good plea that the plaintiff has *precipe quod reddat ad terminum qui prateriit* in C. B. of the same land pending against the same tenant to which he has appeared, judgment of the writ; by which the plaintiff said, that he who pleads it is not tenant, but another named in the writ; upon which they were at issue; and so see it is a good plea in one Court, that a writ of a higher nature is pending of it between them in another Court; and he did not shew the record of it, and yet admitted for a good plea. Br. Brief, pl. 282. cites 23 Aff. 14.

2. In *assise* it was admitted for a good plea, that the plaintiff

in

in the assise has writ of entry in the post against the tenant of the same tenements, in which he had the view; judgment of this writ of a baser nature pending the other of a higher nature. Br. Brief, pl. 298. cites 29 Aff. 66.

3. Writ of entry in nature of assise; the tenant demanded judgment of the writ, because this writ is purchas'd pending an assise of novel disseisin of the same land; it was held that where the second writ is of a more high nature than the first is, there the first writ shall abate, by the best opinion there: and per Cottesmore, writ of entry in nature of assise, is more high than assise; for release of actions personal is a good bar in assise; and assise lies against disseisor and tenant, and writ of entry in nature of assise lies against the tenant of the franktenement only. Br. Brief, pl. 17. cites 9 H. 6. 50. S. P. Ibid. pl. 172. cites 8 H. 6. 37.

4. In formedon the parties were at issue; the tenant said that after the last continuance, the demandant has brought against him writ of entry in nature of assise of the same land, to which writ the tenant is assign'd; and demanded judgment of this writ of formedon: And per Newton & Fulth. Because the formedon is more high, therefore it is the better plea, to abate the writ of entry, to say that the demandant has formedon pending &c. by which the tenant waived this plea. Br. Brief, pl. 189. cites 22 H. 6. 35. [ 144 ]

### (C) Pleadings of other Actions pending in another Court.

1. IN assise, the tenant said that after the last continuance the plaintiff had brought writ of right against him of the same land in the Court of the Lord, to which he has appeared; this is a good plea to the writ of assise, per Birton, which Hill Justice denied, unless the mise be join'd there. And so see that by another writ brought in another Court, that writ shall cease. Br. Brief, pl. 150. cites 21 E. 3. 25.

2. In assise, the tenant said that the plaintiff at another time brought assise against him in the King's Bench, which was adjourn'd till now; and this writ is purchas'd pending the other, judgment of the writ; the plaintiff said that the King's Bench was removed into another county, and so this assise discontinued; and yet because he confess'd that this assise was brought pending the other, the writ was abated. Br. Brief, pl. 284. cites 25 Aff. 5.

3. In trespass in B. R. of beasts taken it is a good plea that the plaintiff has \* replevin pending of the same taking in C. B. to which he has appeared; judgment of the writ; quod nota: and so see that a man may plead to the writ in one Court by record pending in another Court; and so see that in debt in the one Court, it is a good plea that he has the like action pending in another Court of detinue. \* S. P. per Newton Ch. J. Br. Brief, pl. 127. cites 22 H. 6. 15. — So that he has writ of detinue.

*pending of the same goods, for those affirm property in the plaintiff; contrary of writ of trespass; Per Newton Ch. J. Note the diversity.* Mr. *ibid.*

Court of the same debt, to which the plaintiff has appear'd Br. Brief, pl. 304. cites 40 Aff. 32.

Br. Dette, pl. 35. cites S. C. — Upon an *indebitatus*, the defendant pleads in abatement another action depending for the same matter in the *Exchequer*, and doth not say, that the plaintiff has declared thereupon; this is naught; *because it can't be traversed, whether it be for the same matter or no.* L. P. R. 7. cites M. 7 W. B. R. and Sparrie's Case. 5 Rep. 61.

4. Debt upon a bond of 20 l. in Banco, the defendant said that he has another action of the same debt pending yet in the *Exchequer* by bill, judgment of the writ; and a good plea; per Mowbray and Finch. clearly, tho' it be in another Court. Br. Brief, pl. 65. cites 43 E. 3. 27.

ment another action depending for the same matter in the *Exchequer*, and doth not say, that the plaintiff has declared thereupon; this is naught; *because it can't be traversed, whether it be for the same matter or no.* L. P. R. 7. cites M. 7 W. B. R. and Sparrie's Case. 5 Rep. 61.

S. C. cited 5 Rep. 62. In Sparrie's Case. — To an action of *trover*, or *debt on bond*, 'tis a good plea to say there is another action depending in the Courts at Westminster for the same matter; but that there is an action in an inferior Court, is not good, unless judgment be given. So in an action of *trespass*, after the plaintiff has declared 'tis a good plea. R. S. L. 7. cites 5 Co. 62. — *Indeb. assumpsit* for horse-meat, defendant pleaded an action pending in the Sheriff of London's Court for the same cause; and held no plea, because an action pending in an inferior Court is no bar to an action in a superior Court for the same cause. 12 Mod. 204. Mich. 10 W. 3. Brinsby v. Gold.

5. Debt upon an obligation in Bank; the defendant pleaded to the writ that such another plaint is brought against him in London upon the same obligation upon which they are at issue, which is yet pending; judgment &c. Thirn. rul'd the defendant to answer. Br. Brief, pl. 107. cites 7 H. 4. 8.

plea to say there is another action depending in the Courts at Westminster for the same matter; but that there is an action in an inferior Court, is not good, unless judgment be given. So in an action of *trespass*, after the plaintiff has declared 'tis a good plea. R. S. L. 7. cites 5 Co. 62. — *Indeb. assumpsit* for horse-meat, defendant pleaded an action pending in the Sheriff of London's Court for the same cause; and held no plea, because an action pending in an inferior Court is no bar to an action in a superior Court for the same cause. 12 Mod. 204. Mich. 10 W. 3. Brinsby v. Gold.

S. P. Br. Estoppel, pl. 1. cites 3 H. 6. 15. & 39.

6. Debt upon a bond in Banco, and counted that it was made in London; Paston pray'd judgment of the writ, for he has a plaint upon the same bond yet pending in N. by which he supposes the bond to be made in N. Et non allocatur; for it is out of the case of two actions pending together, for it ought to be in one and the same Court; and it is no estoppel, for the other action is only supposal. Br. Brief, pl. 8. cites 3 H. 6. 15.

S. P. *ibid.* pl. 514. cites F. N. B. 275.

[ 145 ]

7. In assise, if the tenant pleads that plaintiff has writ of a bigger nature pending against him in C. B. of the same land, there if they are at issue that no such record, the tenant may have it certified by certiorari into Chancery, and sent to them by mittimus; and so see that it is a good plea, tho' it be in another Court. Br. Brief, pl. 416. cites F. N. B. 244.

S. C. cited Gibb. 314. and Eyre J. said that the general rule is, that the party shall not be twice vexed for the same cause of action; but then it must appear that

8. A. brought action upon the case for *trover* and conversion of &c. in the *Exchequer* against B. The defendant pleaded that the plaintiff had other action upon the case pending in B. R. for the same *trover* &c. and that this suit was prosecuted pending the other: judgment of the bill. And upon a demurrer it was resolved per tot. Cur. that the bill shall abate, 1st, because of the maxim, *Nemo bis vexari debet, si constet Curie quod fit pro una & eadem causa.* 2. That tho' the first action was in another Court, viz. in B. R. or vice versa, yet the plea is good. But a suit brought prior in an inferior Court, shall not abate the writ brought

brought in any of the Courts at Westminster. 5 Rep. 61. a. 62. a. Mich. 32 & 33 Eliz. Sparry's Case.

*the Court, which was first possessed of the cause,*

*had jurisdiction, and that it will not be so intended, unless pleaded. (C. B.) Dudfield v. Warden. — Legatee Infant su'd in the Ecclesiastical Court, and pending this su'd in Chancery, and allow'd; for this is most for his security. 2 Ch. Cases 85. Hill. 33 & 34 Car. 2. Howell v. Waldron.*

9. If two actions are brought in different Courts upon the same promise, tho' for different sums, the one action may be pleaded in bar of the other. 10 Mod. 285, 286. B. R. Aylwood and Woolley's Case.

(D) Pleadings of other Actions pending against different Persons for the same Thing.

1. *Trespass* of taking his horse; the defendant said that the plaintiff has replevin pending of the same taking against the mayor and commonalty of D. and he is one of the commonalty; judgment, if to the writ of a more base nature &c. and no plea without saying that he was one of the commonalty the day of the caption &c. Br. Brief, pl. 433. cites 8 H. 6. 27.

*In trespass where there is a replevin depending for the same cause, it is a good plea, where there are no more*

*defendants in the replevin than in the trespass. R. S. L. 7. cites S. C.*

2. If a man sues *scire facias* in B. R. against A. and B. supposing them to be tenants, and another *scire facias* in C. B. against C. and D. supposing them to be tenants of the same land, the suing of the one writ shall not abate the other. Per Cur. Br. Brief, pl. 412. cites 11 H. 6. 43.

3. *Præcipe quod reddat* against tenant for term of life of the land, and another *præcipe* of the same land against him in reversion as *permour* of the profits; and the tenant for life pray'd aid of him in reversion, who joined in aid, and pleaded this matter to the writ, because the demandant has two writs pending against him of the same land; and it is adjudged in the books, that the vouchee shall plead such pleas in abatement of the writ; and yet the opinion of all the Justices of Bank was, that the writ is good, for he is not twice vexed by the act of the demandant, but by his own act by the joining in aid; for he is at liberty to join or not, but upon a voucher he is compell'd to join: but per Keeble, the vouchee shall not have such plea, for he is not twice vex'd by the act of the demandant, but by his collateral covenant. And so of the tenant by rescuit and garnishee. Br. Brief, pl. 196. cites 15 H. 7. 8, 9.

4. An action of *trespass* was brought against two, they both plead in abatement another action of *trespass* depending against one alone for the same *trespass*. Holt Ch. J. doubted, but the other three J. inclined that the plea was good as to both the defendants. Carth. 96. Mich. 1 W. & M. B. R. Rawlinson v. Oriet and Benson.

(E) In what Cases it is a *good Plea*.

In assise it is no plea that this assise is purchased pending a prior assise of the same land, if the plaintiff

be not made in the first assise; for a man does not know of what tenements he will make his plaint. Br. Brief, pl. 271. cites 14 Aff. 7.—S. P. Ibid. 296. cites 29 Aff. 40.—\* Orig. is (place.)

1. **I** F a man brings assise, and makes his plaint, and after brings another assise of the same land, and in the one writ is a greater quantity, as one \* plaint contains 40 foot &c. and the other 100 foot; yet the writ shall abate; quod nota; and this seems to be by appearance to the first writ, as appears by the plaint. Br. Brief, pl. 269. cites 12 Aff. 1.

2. A man brought assise, and pending this the tenant infeoffed the plaintiff, and after the plaintiff brought another assise against the same feoffor, who pleaded that this assise is purchased pending the first, & non allocatur; for by the entry of the plaintiff to take the livery the first assise was abated; and so see that an entry shall abate a writ in fact, and upon this the writ was awarded good. Br. Brief, pl. 302. cites 35 Aff. 4.

3. In trespass of taking his sheep, it is no plea to the writ, that he has writ of detinue pending of the same sheep, to which he has appeared, judgment &c. sed non allocatur; because they are not of one and the same nature. And so see that he said that he had appeared to the other writ; for otherwise it may be taken in his name by covin; and by action of trespass nothing shall be recovered but damages; and by action of detinue, the thing itself. Br. Brief, pl. 62. cites 43 E. 3. 23.

But contra of scire facias upon a recovery of land, &c. Br. Ibid.—Or where a man may be twice damaged. Br. Ibid.—But where it is not to recover any thing, but to repeal a thing, as here, there a man may have two writs pending together; quod quære. Br. Ibid.

4. Scire facias in Banco to repeal letters patents, the defendant pleaded to the writ, because the plaintiff had another scire facias pending there of the same matter. Huls said, this is no matter; for a man may have as many of those writs as he will to repeal a patent. Br. Brief, pl. 103. cites 3 H. 4. 6.

Br. Estoppel, pl. 90. cites 22 H. 6. 43. Contra per Portington, that if a man brings an action ancestor against me, and conveys by W. P. his father, and brings other action against me, and conveys by T. P. his father, the user of the first action shall be an estoppel.

So, if J. P. brings an action against me, and after declaration made he brings another action against me by name of T. P. the user of the first action may be pleaded by way of estoppel; per Pole. Br. Estoppel, pl. 90. cites 22 H. 6. 53.

5. If I bring formedon of the gift of N. and after bring another writ, and make another conveyance, the first action is no estoppel; per Babington; nota. Br. Estoppel, pl. 1. cites 3 H. 6. 15. 39.

6. A man may have action against two by several precipes, or action simul & semel; for he cannot recover but once, and he who has not the land may disclaim or plead nontenure. Br. Maintenance de Brief, pl. 30. cites 4 H. 6. 14. 15.

7. Debt

7. *Debt for salary in the art of limner for a year; the defendant said, that at another time the same plaintiff brought another writ of debt of the same duty returnable &c. and this writ was purchased pending the other writ; judgment of the writ. Per Martin, this is a good plea in every case where the demand is certain; as in præcipe quod reddat of a carve of land, or the like; but in trespass it is no plea; for the damages are uncertain, & tota Curia concordat.* Br. Brief, pl. 211. cites 4 H. 6. 19.

8. In debt, the case was that a man granted an annuity of 20 l. per ann. solvend' &c. and that if it be arrear at the day, that he shall forfeit 10 l. nomine pæne; he brought writ of annuity, and recovered the annuity; the defendant brought writ of error, and removed the record, and pending this the grantee brought writ of debt of the penalty in C. B. and the defendant said, that there is a writ of error pending of the principal annuity; and because the plaintiff had the deed to shew, and this penalty is not any part of that which was adjudged in the first action, therefore per judicium the defendant was awarded to answer over. And so see that tho' no writ of debt lies of the annuity so long as the annuity continues, yet writ of debt lies of the penalty; for this is not a thing which shall continue, unless by laches of the grantor; but where a man recovers land and damages in præcipe quod reddat, and the tenant brings writ of error, the demandant cannot have action of debt of the damages upon the record pending the writ of error; for this action is founded upon the record, but the action upon the principal case is founded upon the deed, which cannot be damn'd because the annuity continues; and in the pleading of this matter, the defendant demanded judgment if the Court would take consuance. Br. Dette, pl. 106. cites 4 H. 6. 31. [ 147 ]

9. *Where a man purchases two writs of debt &c. returnable at one and the same day, and the defendant appears to both, both shall abate; per tot. Cur. quære inde; but contra if he appears but to one.* Br. Brief, pl. 17. cites 9 H. 6. 50.

*So of two assizes; per tot. Cur. Br. Ibid.—But where a man purchases two writs of one and the same nature, the one after the other, there the second shall abate; per tot. Cur. Br. Ibid.—But if a man purchases two writs, the one in one Court, and the other in another, he shall not plead the one in abatement of the other; but if he recovers and sues execution upon the one, he shall plead it in the other; per Babington. Br. Ibid.*

10. If one writ of conspiracy be purchased pending another writ of the same conspiracy, yet it shall not abate; for several conspiracies may be in one and the same day; and therefore he pleaded not guilty. Br. Conspiracy, pl. 18. cites 19 H. 6. 34.

11. In forger of false deeds the defendant demanded judgment of the writ; because the plaintiff had a like writ of the same forgery of deeds, to which he had appeared, and this writ purchased pending the other; for the writ in this case is general, quare diversa falsa facta fabricavit, or quoddam falsum factum fabricavit, and the defendant has not pleaded that the plaintiff has counted in the first writ, so that the certainty may appear; for which reason Newton compared it to the writ of trespass, and

The Reporter, in a note in 5 Rep. 61. b. in SPARRIE'S Case, where this Case and the Case of 5 H. 7. 15. a. b. are cited, says,

that the diversity between the two cases is, that in this case it is *parcel of the plea to the writ that the plaintiff had declared*, by which he has made the thing certain; but in the Case of 5 H. 7. 15. it was not parcel of the plea that the plaintiff had counted. But that the principal Case of 5 H. 7. 15. was affirmed to be good law.

This case was allow'd; but the reason of this case, which seems to have been mistaken by the reporter, was utterly denied by the Court; it being said that because diverse trespasses may be done in one and the same day, therefore it is no plea (as there it is said) in trespass that other action is pending &c. for the same trespass; for by the same reason, after the plaintiff has recovered in trespass, and brings action for the same trespass again, the defendant cannot aver that all is for one and the same trespass. 5 Rep. 61. b. in Sparrie's Case.

S. P. For several trespasses may be made upon one day, quod nota; nevertheless where he says that the plaintiff has declared in the first action, it is a good plea per 22 H. 6. fo. 51. quod mirum! therefore quære bene. Br. Trespas, pl. 385. cites 19 H. 6. 31.

[ 148 ] 14. Where a man purchases two writs, and the defendant appears to both, there the second shall abate tho' the first abates, or that the plaintiff be nonsuited in the first; because a man shall not be twice vexed for one and the same thing simul & sennel. Br. Brief, pl. 255. cites 39 H. 6. 12. by Prifot and Danby and the best opinion. And this is where the demand is certain; but contra where the demand is uncertain, as in trespass, assise &c. before plaint and count; for these are not certain before plaint or count. Br. Brief, pl. 255, cites 39 H. 6. 12. by Prifot and Danby and the best opinion.—5 Rep. 61. Sparrie's Case.—5 Rep. 61. Mich. 32 & 33 Eliz. in the Exchequer. Sparrie's Case.

But if he appears to both and makes plaint, and after is nonsuited in the first, yet there the second shall abate, by Prifot and Danby and the best opinion, quod nota. Br. Ibid.—But per Asheton and Moyle, this is in plea real, and not in plea personal; and so in plea personal it is no plea, if he does not say that the first writ is yet pending; quære inde; for the best opinion was, that it shall abate, tho' it be not yet pending, for the cause above said. Br. Brief, pl. 255. cites 39 H. 6. 12.—And such another case was in the same year, fo. 29. where the greater opinion of the Court was clear with Prifot as here; quod nota bene, quia bonus casus. Ibid.

16. The ancient difference in our books is between writs which comprehend certainty, as in debt, detinue &c. and writs which comprehend no certainty, as assise, trespass &c. For in writs certain, (whether real, personal, or mixt) it is a good plea to say that the

writ

writ is purchased pending the other. But in writs real or personal, where no certainty is contain'd, it is no plea. But in *assise, trespass &c.* after plaint or count made (which plaint or count reduces the generality of the writ to a certainty) then writ purchased after such plaint or count shall abate. Mich. 32 & 33 Eliz. in the Exchequer. 5 Rep. 61. Sparry's Case.

17. And so it is, tho' one action be in C. B. and the other in B. R. But otherwise it is if action of debt be brought in London or Norwich or any other inferior court, and after in C. B. In this case the suit in C. B. which is a more high court, which is purchased pending the suit by bill in an inferior court shall not abate. 5 Rep. 62. Sparry's Case.—cites 7 H. 4. 8. a. 3 H. 6. 15. a. b. Vid. 43 E. 3. 22. 27. and 7 H. 4. 44. a. b. BIRMINGHAM'S CASE. But it is said, 9 E. 4. 53. b. that all the King's Courts at Westminster have been time out of mind, and so no man can know which of them is the most ancient. Ibid. in the Exchequer.

18. *Nemo debet bis vexari, si constet Curia, quod sit pro una & eadem causa.* Vid. Maxims.

(F) Pleadings. *How the Pleading must be.*

1. *Conspiracy* against 2, eo quod ceperunt 20 impes felonice, where per Forcu it should be *cepissent*, & non allocatur; but the writ awarded good, for it agrees with the indictment; by which they said that it was purchased pending another writ of the same conspiracy, judgment of the writ, & non allocatur, no more than in trespass, for 20 trespasses or 20 conspiracies may be made in one day and place. Br. Brief, pl. 177. cites 19 H. 6. 34.

2. In *trespass* the defendant said, that the plaintiff had another writ pending against him of the same trespass, upon which he has declared, judgment of the writ. Ashton said, this is no plea if he does not say that he recovered and sh'd execution. And the Court awarded that the writ shall abate, quod mirum! for the contrary [ 149 ] seems to be law. Br. Brief, pl. 191. cites 22 H. 6. 52.

3. In *appeal* the defendant said, that the plaintiff has another appeal pending of it, of a prior date, which is of record here, judgment of the writ; and no plea, without saying that the plaintiff appeared to it; for it may be done by covin of a stranger &c. Br. Brief, pl. 467. cites 7 H. 7. 6.

4. A. *quare impedit* was brought against the bishop, and afterwards another was brought against the bishop and incumbent, who plead the other action against the bishop only, and that the disturbance in either declaration is one and the same. The plaintiff replied that the first writ was brought for another disturbance, and traverses, absque hoc that they are one and the same impediment. But upon demurrer it was adjudged a good plea in abatement; for tho' the presentation and disturbance are both in question, yet the presentation is the main, and the disturbance

only as accessory. Brownl. 163. Trin. 14 Jac. Bedford (Earl) v. Bishop of Exeter.

5. In an action of *debt tam quam* upon a penal statute; the defendant pleaded, that there was another depending for the same thing, and because he *did not say, that the other was depending before this was brought*, it was held to be no plea; for perhaps after this was brought, the same term the defendant might procure some fraud covenantly to prosecute another. Freem. Rep. 400. Trin. 1675. Hutcheson v. Thomas.

6. *Case against B. K. by a wrong name.* The defendant pleaded in abatement. Thereupon the plaintiff, without proceeding further, brought a new action against him by his right name, to which defendant pleaded another action pending. And per Holt Ch. J. the plaintiff should have discontinued the first action, but it will be too late to do it now; for the discontinuance will relate only to the time of its being enter'd on record; so that nul tiel record will be against him; for it was pending at the plea pleaded. 1 Salk. 329. Hill. 2 Ann. B. R. Knight's Case.

7. In *indebitatus assumpsit* for goods sold and deliver'd the defendant pleaded, *quod ipse ad narrationem prædictam respondere non debet, because there is another action pending ex eadem causa in C. B.* Per Cur. This is not a demurrer to your declaration, or a plea in bar, but in abatement of the declaration, and *respondeat ulterius* was awarded. 6 Mod. 157. Pasch. 3 Ann. B. R. Rowston v. Combat.

8. In action on the case for several *promises for work and labour done in the parish of St. Mary le Bow, London*, the defendant pleaded in abatement, that the plaintiff had libel'd in the Admiralty for the same cause of action. But upon a demurrer it was ruled according to SPARRY'S CASE, that the defendant should answer over, the priority of suit in an inferior court being no plea to an action brought in any of the Courts at Westminster. And Eyre Ch. J. said, that the general rule is, that a party shall not be twice vexed for the same cause of action; but then it *must appear that the Court* which was *first possess'd of the cause had jurisdiction*, and that in this case the cause of action must be taken to have arose where it is laid, viz. in London, that being not contradicted by the plea; that *nothing shall be intended within the jurisdiction of an inferior court but what is averred so to be*, and therefore it not being averred that the cause of action here arose *super altum mare* it must be taken that the Admiralty had no jurisdiction thereof; that the plea does *not aver that the plaintiff had declared in the Admiralty*, and therefore it being in case, the demand is not reduced to a certainty, and then it cannot be said whether it is the same cause of action or not. And Fortescue J. said it was within the rule of Sparry's Case, which he said was never denied. Gibb. 313, 314. Trin. 5 Geo. 2. C. B. Dudfield v. Warden.

Overseers of the Poor.

(A) *Appointed who, by whom, and how.*

1. THE Justices of the Peace, who have the appointing of overseers, must be careful to choose such men as in every town are fittest, viz. *substantial persons who have competency of wealth, wisdom and a good conscience.* And they must be *householders* and *not sojourners* however otherwise qualified. Dalt. Just. 216. chap. 73. f. 2.

2. By Stat. 43 Eliz. overseers of the poor must be *appointed* by the 2 next Justices of Peace; and per Holt Ch. J. an *appeal* will not lie, but Eyre J. doubted. Carth. 161. Mich. 2 W. & M. B. R. The King v. Moor.

3. A citizen of London, who had a *country-house* at H. and lived in it in the Summer, was chose overseer of the poor there; but the Court disapproved it. Carth. 161. Mich. 2 W. & M. B. R. The King and Queen v. Moor.

4. Two Justices made an order for J. S. to take upon him the office of overseer; exception was taken, 1. That it did not *appear* by the order *that J. S. was an inhabitant or housekeeper.* 2. That the order *appointed him overseer of that part of the parish that lies in Middlesex, (the parish extending into London and Middlesex.)* The Court seem'd to think the appointment ought to have been for the whole parish, and afterwards they might order him to meddle only with such a division. 6 Mod. 77. Mich. 2 Annæ, B. R. St. Andrew's Parish's Case.

Nelf. Just. 540. cites S. C.—  
Just. Case-Law 23. cites S. C.—  
2 Shaw's Pract. Just. 34. cites S. C.

(B) *Their Power.*

1. THE church-wardens and overseers may, by and with the consent of two or more Justices of Peace (whereof one to be of the quorum &c.) within their respective limits where there are more than one, or if but one, then by his consent, *set up, use and occupy any trade, mystery or occupation, for the setting on work only and better relief of the poor of the parish, town or place where they are overseers.* Dalt. Just. 216. cap. 73. f. 6.

2. Churchwardens and overseers may *make a rate of themselves.* 2 Salk. 531. Hill. 2 Annæ, B. R. Tawney's Case.

Peace, and if refused to be paid, may be distrained for; and there ought to be a *monthly rate*, because of possessions changing. 6 Mod. 98. Hill. 2 Annæ, B. R. S. C. by name of the Queen v. Littleport.

So it be confirmed by Justices of

3. It is discretionary in overseer to provide necessaries, or pay weekly rates. Just. Case Law 231. cites 2 Shaw 140. and Style 246.—2 Shaw's Pract. Just. 32. cites S. C. (but Style is mis-cited.)

[ 151 ] 4. 5 Geo. 1. cap. 8. s. 1. enacts, That it shall be lawful for the church-wardens or overseers, where any wife or children shall be left by their husbands, fathers or mothers, on the charge of such parish, by warrant or order from any two Justices of Peace, to seize so much of the goods, and receive so much of the annual rents and profits of the lands of such husband, father or mother, as such Justices shall direct, for the discharge of the parish for the providing for such wife &c. which order being confirmed at the next quarter-sessions, the Justices at such sessions may make an order to dispose of such goods by sale or otherwise, and to receive the rents and profits &c. for the purposes aforesaid.

5. 9 Geo. cap. 7. s. 4. enacts, That the church-wardens and overseers, with the consent of the parishioners or inhabitants in vestry may purchase or hire houses in the parish &c. and contract with persons for the lodging, maintaining and employing such poor in their parishes &c. as shall desire relief; and if any poor person shall refuse to be lodged in such house, he shall be put out of the books, and shall not be intitled to relief; and two or more such parishes &c. with like consent, with the approbation of a Justice of Peace dwelling in or near such parish &c. may unite in purchasing or hiring such a house: and the church-wardens and overseers of any parish &c. with the like consent &c. may contract with the church-wardens and overseers of any other parish &c. for the lodging, maintaining or employing of any poor persons, &c. provided that no person, his apprentice or children, shall acquire a settlement in the parish &c. to which they are removed by virtue of this act.

### (C) Orders of Justices &c. as to Overseers.

1. THE Justices, by the general words of the statute, have power to name overseers in all parishes, which must extend to extraparochial places, as well as to parishes in general; for where there is the same inconvenience, it should be subject to the control of the Justices, and most of the Forests in England are extra-parochial, but they ought to maintain their own poor. Nelf. Just. 539.

\* Orig.  
Church-  
wardens.—  
Nelf. Just.  
538. cites  
S. C.—  
Just. Case-  
Law 232.  
cites S. C.  
and Black.  
226.—  
2 Shaw's  
Pract. Just. 35. cites S. C.

2. Three Justices took the account of \* overseers &c. of T. for the year 1697. and adjudged that there was thereupon due from them to the parishioners of T. 69l 8s. 10d. for the re-payment thereof to the succeeding overseers for the year 1698, the Justices made an order; to which it was excepted, that the Justices had no power to make such order, but only to issue warrants to distrain; but the Court ruled the order to be well made, and confirmed the same. 2 Salk. 484. Hill. 10 W. 3. B. R. The Church-wardens of Topsham's Case.

3. 'Twas moved to quash an order of sessions, which was made to pay a surgeon's bill, who had cured a poor person; and urged that the Justices have no power to make such an order, for 'twas trying a quantum meruit. Holt Ch. J. If a surgeon cure a sick person that is poor, he must have his *action against the overseers* of the parish, and then the Justices make an order to reimburse the overseers; but they can't make such an order as this; for an action is the proper course. Therefore quashed. 11 Mod. 178. Trin. 7 Ann. The Queen v. Inhabitants of Belzim St. Paul's.

4. Upon complaint of A. executor of B. overseer of Thame in the year 1699. and that he had expended the sum of 161. in the execution of his office, and is not yet reimburs'd, the Sessions order'd all parties concern'd to attend three Justices. and they to report it to the next sessions, who reported that the sum of 161. was actually laid out, and that it has not yet been repaid; and that it ought to be paid to the executor. The Justices at the sessions confirm'd the said order; which order was quashed in B. R. for, 1. the overseers are *not bound to lay out money out of their own pockets*; for there is a remedy given by the statute, viz. by weekly taxation; and no rate can be made to reimburse them, and it was adjudged in \*Townly's Case some years ago, where a mandamus went; but upon the return it was held ill, and quash'd. And the statute gives no provisional remedy, but says if there be any money left in the hands of the overseer, it shall be transmitted over to the successor. Besides, in this case there would be a great inconvenience; for the money in this case has been due thirteen years; and a person who is now become a parishioner, would be liable to contribute to a debt, when perhaps he then lived 40 miles off: and per Powis J. those ought only to be contributory who were livers there the year before, and none else. Poor's Settlements 48. pl. 71. Mich. 12 Ann. B. R. The Inhabitants of Ware v. Petit Executor of Town.

\* Vide (2).  
Tawney's  
Case, seems  
to be S. C.

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### (D) Orders of Justices &c. as to Overseers Accounts.

1. Overseers upon summons gave a general account of receipts and disbursements, but refusing to give a particular account, or to produce the books by which they received the monies on the rates assess'd &c. two Justices commit them till they should make a true account &c. Per tot. Cur. The Justices have no authority to commit in this manner by the stat. 43 El. because an account was confessed to have been rendred &c. Show. 395. Pasch. 4 W. & M. The King v. Carrock.

2. Overseer may be committed till he account, by the stat. 43 El. Arg. Comb. 305. Mich. 6 W. & M. in Clerk's Case.

An overseer  
was indicted  
at sessions,  
and Holt  
Ch. J. said  
that an indictment  
at sessions seem'd  
to be within the  
direction of the  
statute. Comb.  
374. Trin.  
8 W. 2. The King  
v. Hummings.—S. C.  
argued, but  
adjournatur. 5  
Mod. 179.—2  
Shaw's  
Pract.

that an indictment at sessions seem'd to be within the direction of the statute. Comb. 374. Trin. 8 W. 2. The King v. Hummings.—S. C. argued, but adjournatur. 5 Mod. 179.—2 Shaw's Pract.

Pract. Just. 31. cites S. C.—Nelf. Just. 539. cites S. C.—2 Shaw's Pract. Just. 35. cites S. C.—  
Just. Case Law. 232. cites S. C.

Nelf. Just.  
538. cites  
S. C.—  
2 Shaw's  
Pract. Just.  
62. cites  
S. C.—Just.  
Case Law.  
232. cites  
S. C.

3. A *mandamus* was granted to two Justices of Peace out of 43 Eliz. commanding them to *compel the precedent overseers* of the poor of the parish of A. to come to an account with the present overseers; and this writ was quash'd, 1. because the account by 43 Eliz. is to be given to two Justices, and not to the succeeding overseers. 2. Two of the persons named in the writ, whom the Justices were to compel to come to an account, do not appear to have been overseers. 2 Salk. 525. Hill. 13 W. 3. B. R. Anon.

4. Justices of Peace are not absolute judges of accounts of overseers of poor, but an *appeal lies* from them to the *Sessions*, in case of overcharge or other wrong; but Justices may audit the account of the overseers before the year be out, in case he be not turned out before that time. Per Cur. 12 Mod. 560. Mich. 10. W. 3. Anon.

5. The defendant being overseer of the parish of Westbury in the county of Wilts, and his accounts being allowed and confirmed, several years after the parish appealed against his accounts. And per Cur. The act of parliament being silent as to the time, the parish may appeal at any time. Poor's Settlements 83. pl. 110. The King v. Bouen.

### (E) Punished or aided.

\* This must be within 4 days after the end of the year, and after other overseers are appointed. Ibid. in the marg.—  
S. P. Nelf. Just. 538.  
—† S. P. 2 Shaw's Pract. Just. 32.

1. IF the overseers and churchwardens, or either of them shall refuse to make and yield a true and perfect \* account to the Justices of Peace of all such sums of money as they have received, and of all such stock as they have in their hands, any two Justices may commit them to the common gaol, there to remain without bail till they have made a true account, and satisfied and paid (to the new overseers) so much of the said sum and stock as upon the said account shall be remaining in his (or their) hands &c. † And if they make a false account, they may be bound over to the assises or sessions, and there an indictment may be preferred against them. Dalt. Just. 224. cap. 73.

S. P. Nelf. Just. 538.

2. Also, if any of the overseers &c. shall refuse or deny to pay and deliver over to the new overseers the *arrears* (sums of money or stock) which shall be in their hands, and due, and behind in their account to be made as aforesaid, any two such Justices of Peace may make their warrant to the present or subsequent overseers &c. or any of them, to *levy the same by distress and sale* of the offenders goods, rendering to the parties the overplus; and in defect of such distress, any two such Justices of Peace may commit him or them to the common gaol, there to remain

remain without bail, until payment or delivery of the said sum, arrearages, and stock be made. Dalt. Just. 224. cap. 73.

3. An indictment of the overseers of the poor was taken before the Justices of the borough of Reading, for not gathering several sums of money taxed on several of the inhabitants therein, being certain; exception was taken thereto, sed non allocatur, but the parties ordered to plead, having notice of the persons tax'd. 3 Keb. 49. pl. 24. Trin. 24 Car. 2. B. R. The King v. Brown &c.

2 Shaw's Pract. Just. 32. cites S. C. — Ibid. 35. cites S. C. — Just. Case Law, 231. cites S. C.

4. An overseer was indicted for not obeying an order of sessions concerning the settlement of a poor man. Cumb. 213. Trin. 5 W. & M. The King v. Pope.

5. Overseers and church-wardens were indicted for not making a rate to reimburse the constables, according to the statute 14 Car. 2. cap. 12. Exception was taken, that the statute only enables them to do so by the word (*may*) but does not require it of them as a duty, so that they are punishable for the omission; sed non allocatur; for where a statute directs the doing of a thing for the sake of justice, or the publick good, the word (*may*) is the same as (*shall*). 2 Salk. 609. 5 W. & M. B. R. The King and Queen v. Barlow.

Carth. 296. S. C.

6. An overseer charged the parish *falsly* with 3 l. for putting out an apprentice, and his accounts are allowed by two Justices, but in truth the apprentice was not put out at all; the parish complain to the Sessions, and they order, that the late overseer should repay the 3 l. so fraudulently obtain'd, with costs &c. Per Eyre J. This order cannot be maintained; for the sessions have no jurisdiction, but there may be another remedy by indictment &c. Cumb. 287. Trin. 6 W. & M. B. R. Anon.

7. If overseers of poor, being convened before two Justices to make their accounts, do refuse, the remedy is to appeal to Quarter Sessions. Per Cur. 12 Mod. 251. Mich. 10 W. 3. Anon.

8. An overseer disbursed his own money, and was turned out of his office by the Justices before the end of the year, so that he lost the opportunity of making a rate to re-imburse himself. A mandamus was granted for making a rate to re-imburse him; but per Holt Ch. J. a mandamus does not lie in this case, but only to raise money for the relief of the poor, nor can they make a rate otherwise. The act of parliament is expressly so, and must be pursu'd; and per tot. Cur. the mandamus lies not; and so it was quashed. 2 Salk. 531. Hill. 2 Ann. B. R. Tawny's Case.

6 Mod. 97. Hill. 2 Ann. B. R. The Queen v. Littleport. S. C. — 8 Mod. 339. S. C. cited and held accordingly. Mich. 11 Geo. The King v. Re.

tharhish Parish. — Nelf. Just. 538. cites S. C. — 2 Shaw's Pract. Just. 34. cites S. C. — 10 Mod. 104. Mich. 11 Ann. B. R. Ware Parish's Case. — R. S. L. 5 Vol. 24. cites S. C.

9. An overseer is not bound to lay out money till he has it; but if he does, he must make a new rate for the relief of the poor, and out of that he may retain to pay himself; and in the case above, the overseer having trusted where he needed not to have done so, Holt said, he had not pursu'd the means the statute gave him, and they could not relieve him. 2 Salk. 531. Tawny's Case.

Nelf. Just. 538. cites S. C. — 2 Shaw's Pract. Just. 34. cites S. C. — R. S. L. 5 Vol. 24. cites S. C.

10. On

Welf. Just.  
538. cites  
S. C.—

2 Shaw's  
Pract. Just.  
33. cites  
S. C.—

Ibid. 35.

cites S. C.—R. S. L. 5 Vol. 25, 26. cites S. C.—Just. Case Law 232. cites S. C.

10. On appeal from *allowance of overseers accounts*, Sessions must execute their judgment in the same manner as two Justices ought to do, viz. by sending first their process to distrein, and on return thereof that there is no distreis, then to commit him. 2 Salk. 533. Mich. 4 Ann. B. R. The Queen v. Hedges.

Just. Case  
Law, 235.  
cites S. C.

11. If the overseers make an *unequal rate*, they may be indicted and fined for it. 2 Shaw's Pract. Just. 43. cites 1 Keb. 173. [but there is no such point there.]

12. An overseer not accounting is *to be committed till he does account*, and *not till he be delivered by due course of law*; so he cannot be indicted for it as the other is his fixed punishment by statute. Just. Case Law, 232. cites Black. 225.

[For more of Overseers of the Poor in general, see Rates, Sessions, and other proper Titles.]

## Own Act.

(A) Own Act. Binding, or *relieved against*, in what Cases.

1. *RENT* suspended by an entry was ordered in equity to be paid. Toth. 234. cites 30 or 31 Eliz. Tamworth v. Tamworth.

2. By 21 H. 8. 4. that executor that proves the will shall sell the land.—When he sells, if *he himself has any right to the land by him sold*, his right is not gone by that statute. Arg. Godb. 319. Pasch. 21 Jac. in Case of Sheffield v. Ratcliffe.

3. If *commissioners of bankrupts sell the bankrupt's land, and one has right to the land sold*, his right is not extinct. Arg. Godb. 319. in Case of Sheffield v. Ratcliffe.

4. Land was mortgaged in fee; the mortgagee enters on the estate, and dies seised. The widow of the mortgagee brought writ of dower against the heirs, and after claims the mortgage

*mortgage money*; and decreed accordingly. 2 Chan. Cases 220, Mich. 28 Car. 2. Noy v. Ellis.

5. Land legatees and money legatees decreed to *abate in proportion*, notwithstanding an *agreement to the contrary*. 2 Chan. Rep. 155. 31 Car. 2. Bois v. Marsh.

6. The heir apparent, and one who afterwards became *heir sells in the life of the ancestor*, and receives the money; the ancestor dies, the heir is decreed to convey. 2 Chan. Cases 112. Trin. 34 Car. 2. Clayton v. Duke of Newcastle.

7. A. on marriage of his son *articled to settle an estate tail, where he intended only an estate for life*, with remainder to his sons in tail, and A. insisting in his answer on a clause in the articles, that his son *should do no waste*, which would have been repugnant to an estate of inheritance. Master of the Rolls decreed a settlement accordingly, and the articles to be delivered up. 2 Vern. 13. Mich. 1686. Griffith v. Buckle.

8. A man of weak understanding was prevailed on to give bond to one of his relations to *settle his estate to the use of himself in tail male*, remainder to his next brother in tail male &c. He afterwards *marries, and made a settlement of the estate on the marriage*, and prayed to have the bond delivered up; and it had been decreed accordingly, had he not offered by his bill to settle part of the estate on his brother. 2 Vern. 189. Mich. 1690. Portington v. Earl of Eglinton.

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2 Chan.  
Cases 103.  
Pasch. 34  
Car. 2.  
White v.  
Small.

9. Tho' a *charter party* is so penn'd that no freight can be recovered upon it at law, yet if the owners of the ship have a just demand, equity will relieve. 2 Vern. 210. Hill. 1690. Edwin v. the East India Company.

10. A. seised of Black-acre and White-acre in fee *granted a water-course thro' Black-acre and White-acre to B. and his heirs*; A. *covenanted for himself, his heirs and assigns to cleanse the same*, and that all fines and recoveries levied &c. or to be levied &c. of the grounds, *should be and enure to confirm &c.* the said water-course; a recovery was afterwards had, and a deed executed declaring the uses. The water-course by mesne assignments came to the plaintiff, and Black-acre and White-acre to the defendant. The plaintiff, tho' not bound so to do, *cleansed the water-course for 40 years*, when the defendant built upon the land, and made the cleansing more difficult and chargeable by the obstruction occasioned by the buildings. Plaintiff by his bill prayed an establishment of the water-course, and that defendant and all claiming under him, might from time to time cleanse the same according to the covenant; it was objected that this was only a personal covenant, and not strengthened by the recovery, and that plaintiff, and those under whom he claimed, being sensible of it, had so long done it at their own charge; but the Court held that it was a covenant running with the land and made good by the recovery, and tho' plaintiff had cleansed the same *at his own charge while the expence was little*, yet since the right was plain upon the deed, and the cleansing made chargeable by the building, it was decreed that defendant should

Ch. Proc.  
39. Hill.  
1691. S. C.

should do it, and that plaintiff have his costs. Abr. Equ. Cases 27. Holms v. Buckley.

11. Where a *deliberate act* is done, tho' it attains not the end designed, and should in consequence prove quite contrary, it is not relievable in equity. 2 Vern. 615. Mich. 1708. Hodges v. Hodges.

[For more of Own Act in general, see Agreement, Fraud, and other proper Titles.]

## Own Oath.

### (A) *Allowed, in what Cases.*

Chan. Cases  
227. Pasch.  
21 Car. 2.  
Holtcomb  
v. Rivers  
& P.

1. [ IN regard the *account* in question is of 20 years standing, the defendant shall prove his account by his own oath for what he cannot prove by books and cancelled bonds; for that after so many years his own oath must be accepted as a proof in this case. Chan. Rep. 146. 16 Car. 1. Peyton v. Green.

2. A conveyance was made in consideration of 250*l.* bill suggests that it was in trust for the plaintiff, and *no money paid*, but that it was to skreen the plaintiff from other creditors, and therefore prays a *re-conveyance*. Defendant pleaded that the plaintiff was indebted to him by bond 250*l.* which bond defendant delivered up to the plaintiff, and thereupon plaintiff gave defendant a *release of all his right &c.* It was ordered that if defendant would positively swear that plaintiff was indebted to him 250*l.* for money really lent, and paid before the bond given, and that all was due when the conveyance was executed, then the plea should be allow'd. Fin. R. 335. Hill. 30 Car. 2. Hart v. Hergard,

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3. A decree whereby the defendant was to be concluded by the plaintiff's own oath was for that reason reversed; per Ld. North. Vern. 272. Mich. 1684. Plampin v. Betts.

4. If one brought in in contempt deny all upon oath, he is of course discharged of the contempt; but if he forswears himself, he may be prosecuted for perjury; per Cur. 12 Mod. 511. Pasch. 13 W. 3. The King v. Simms.

5. Order to pay wages in husbandry was made upon the oath of the servant; it was objected as contrary to the rule of evidence, that the servant's oath should be taken in his own cause; and as to its being set forth, that it is upon hearing of counsel, that  
does

does not alter the case. Besides there may be other evidence; for tho' perhaps others cannot prove the contract, yet they may prove the service; but it was quashed; Holt absente. 11 Mod. 266. Hill. Ann. B. R. The Queen v. Cecill.

6. *In odium spoliatoris* the oath of the injured party shall be a good charge on the wrong doer; per Ld. North in confirmation of an order made by Finch C. Vern. 207. Mich. 1683. Childerns v. Saxby.

7. Sums under 40s. are to be allowed the party on his oath; but then he must in his affidavit mention unto whom, for what, and when paid. Vern. 283. Anon.

8. The rule that an accountant shall be allowed on his own oath all sums not above 40s. so that the total is not above 100l. was thought unreasonable by the Court, and would consider how to rectify it. Vern. 470. Wicherly v. Wicherly.

9. The defendant on account shall be discharged by his oath of sums under 40s. but a party shall not by way of charge charge another person so. 2 Chan. Cases 249. Everard v. Warren.

defendant, tho' defendant be allowed sums under 40s. on his oath as to his seeds sold and delivered &c. yet plaintiff shall not be allowed any thing on his oath as to trees that he sold and delivered to the defendant, or the like. 2 Vern. 176. Mich. 1690. Marchfield v. Weston.

In account between a gardiner plaintiff, and a seedsmen

(B) In what Cases one may be relieved, tho' against his own Oath.

1. BILL to compel the defendant to perform a trust and to redeem the premises; defendant denies the trust, and insists that the premises were conveyed to him absolutely for valuable consideration, and that the plaintiff had denied the same to be a trust in several answers; yet decreed the defendant to come to an account with the plaintiff touching the premises. Chan. Rep. 173. 1656. Whitehorn v. Edwards.

S. P. Chan. Cases 133. Mich. 21 Car. 2. Smith v. Palmer.— S. P. Ch. R. 270. 18 & 19 Car. 2. Walker v. Sidenham.

2. A. was indebted by bond to B. and B. to avoid a sequestration of the debt in his answer to a former bill, swore the debt was fully satisfy'd to him; tho' that answer was set forth in the defendant's answer in this cause, yet the Master of the Rolls would not suffer that answer to be read against the plaintiff, and decreed defendants to satisfy the debt. Chan. Cases 154. Mich. 21 Car. 2. Jones v. Lenthall & Ux.

\* Oyer of a deed &c. is when a man brings an action upon a deed, bond &c. and the defendant appears and prays, that he may bear the bond &c. where-with he is charg'd; and the same shall be allowed him. And he is † not bound to plead till he has it, paying for the copy of it. L. P. R. tit. Oyer of a deed &c.—To demand oyer of an obligation, is not only for the defendant's attorney to desire the plaintiff's attorney to read the obligation to him, as the word seems only to import, or to have a sight of it, but that he may have a copy of it, that his client may consider by it what to plead to the action. Ibid.—† 6 Mod. 28. per Powell J.

## \* Oyer of Records, Deeds, &c.

### (A) Given, in what Cases.

1. **I**N *scire facias* against the successor of a parson, upon recovery of an annuity against the predecessor, the defendant had oyer of the record. Br. Oyer de Records, pl. 38. cites 46 E. 3. 6.

2. Debt, the plaintiff declared upon a recovery of 10l. by him against the defendant in Court of Record at Kingston upon Hull; the defendant demanded oyer of the record; and per Thirne. and Hill J. he ought to shew the record; as where he declares upon obligation; but per Hank. contra, and that he may say no such record; and therefore defendant durst not demur upon it, but pleaded other matter in bar. Brook says, the reason seems to be, that the record remains in the Court and not in the custody of the party, as obligation [does.] Br. Oyer de Records, pl. 8. cites 11 H. 4. 11 & 44.

3. *Fieri facias* upon a recovery against executors, the sheriff returned *deavastaverunt*, by which *scire* issued *de bonis propriis*, and it was cum A. & B. had recovered against &c. and did not say in what action, nor if it was by default or verdict; and yet good; for the defendant may have oyer of the record, and then it will appear &c. Br. Oyer de Records, pl. 12. cites 19 H. 6. 49.

4. False judgment by the defendant in debt against him before the sheriff, all was removed by *recordare* in Bank, and there the plaintiff in the writ of false judgment who was defendant in the first action was nonsuited, and *scire facias* to have execution issued against him, upon which he came and demanded oyer of the record. Per Newton, You shall not have it; for you yourselves have removed it, which was not much denied. Br. Oyer de Records, pl. 4. cites 20 H. 6. 18.

5. Debt upon a recovery by the plaintiff against this defendant in writ of entry of 10l. damages. Moyle demanded oyer of the record. Per Browne, In diverse times have been diverse judgments; for in the time of Thirne the defendant should have oyer of record in this case, and in time of Babbington, and all times after he could not have oyer of the record; and by Browne, He

who is party to the recovery shall not have oyer of the record when he pleads it by way of bar, otherwise it is when the recovery is to be executed against him who is party. Br. Oyer de Records, pl. 14. cites 22 H. 6. 38.

6. In *scire facias* upon a recovery of an annuity, in an action in the same Court where the record remained, the defendant shall have oyer of the record; for he cannot say that nul tiel record. But if it be of records of another Court, he may plead that nul tiel record; and therefore there he shall not have oyer of the record; per Brian; quod nota. Br. Monstrans, pl. 158. cites 32 H. 6. 29. & \* 5 H. 7. 24.

\* Br. Oyer de Records, pl. 26. cites S. C. — Antiently nul tiel record could not be pleaded in the same Court; and not else.

but lately it has been us'd to plead it, but then it must be without demanding oyer  
3 Keb. 76. Mich. 24 Car. 2. B. R. in Case of Downs v. Duckworth.

7. And in debt in C. B. brought upon a record removed into B. R. by writ of error, the defendant shall not have oyer of the record, but may say that nul tiel record, and the plaintiff shall certify it in at his peril, sub pede sigilli. Br. Monstrans, pl. 158. cites 18 E. 4. 7. [ 158 ]

8. And in debt in Bank upon tenor of a record of a foreign court where the tenor was certified in by *certiorari* and *mittimus*; the defendant demurr'd because he did not shew the record itself; this demurrer is peremptory per judicium; and the best opinion was that he shall shew the record itself. Br. Monstrans, pl. 158. cites 7 H. 6. 18, 19.

9. And upon a recovery of damages in assise, the plaintiff removed the tenor of the record into Bank by *certiorari* and *mittimus*, and there brought *scire facias*, and by award it does not lie upon the tenor of the record; for it may be that execution is also sued in the court, where the record itself remained; but *e contra* of such certificate out of the treasury; for the treasury cannot award execution. Br. Monstrans, pl. 158. cites 7 H. 6. 18, 19.

10. But it is agreed there, that upon an action of debt brought upon such record, which remained in another court, if the defendant pleads that nul tiel record, and the tenor of the record is certified, it suffices; quod nota diversity between *scire facias* and writ of debt. Br. Monstrans, pl. 158. cites 39 H. 6. 4.

11. And note, that J. S. brought such writ of debt upon a record which remained in another court; and per Prisot Ch. J. and Nideslate prothonotary, it well lies without shewing the record, and if the defendant pleads nul tiel record, it shall be certified by *certiorari* and *mittimus*, and if the defendant be in execution in the other court he may plead it. Br. Monstrans, pl. 158. cites 32 H. 6. 29.

12. But per Brown and the Justices of B. R. the record ought first to come in by *certiorari* and *mittimus*, and then to declare upon the record, by reason of the double execution ut supra. And at last the plaintiff shewed the record, therefore quære if it be of necessity. Br. Monstrans, pl. 158.

13. In quod ei deservat the tenant shall not have oyer of the record;  
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record; for the writ nor the count do not make mention of any record; quod nota. Br. Oyer de Records, pl. 28. cites 2 E. 4. 11.

14. In trespass the issue was, whether the plaintiff was villain to the defendant? and found for the plaintiff; and the defendant brought writ of error in B. R. and after the plaintiff brought action of debt of the damages recovered in C. B. and the defendant demanded oyer of the record, and was ousted; for it does not now remain in C. B. and also the defendant himself is party to it, and has removed the record. Br. Oyer de Records, pl. 31. cites 18 E. 4. 7.

15. In replevin defendant avow'd for rent granted him by a private act of parliament.—The plaintiff demanded oyer of the act. Per Cur. He ought to have oyer; for oyer of no record shall be denied to any person, in case he will demur. And the record of the act shall be enter'd in hæc verba. Godb. 186. Pasch. 10 Jac. C. B. Cook v. Fisher.

16. When a deed, will, or letters of administration are to be shewn in a declaration, the attorney of the plaintiff delivering a declaration with a subscription, that the defendant shall not be compelled to plead till the same be shewn, no judgment by nihil dicit shall be entered against the defendant till the same shewn; nor any nonsuit upon the plaintiff, if he shew the same before the end of the next term. Rules and Orders in C. B. Mich. 1654. f. 15.

17. Wherever the plaintiff declares upon a writing, the Court, on affidavit that he hath no part, will let him have a copy; but where the declaration is on an agreement generally, and the writing is but evidence, they will not grant oyer. 2 Keb. 430. Mich. 20 Car. 2. B. R. Sufter v. Cowell.

159 ] 18. In replevin, the defendant avow'd for a rent-charge, and made title by a will, and pleaded it with a profert; and the plaintiff insisted to have oyer, alledging it was the avowant's folly to make a profert of it, and he ought to take advantage of it. Et per Cur. He was not bound to plead it so; it is but surplusage, and we will not compel him to give oyer of it. 2 Salk. 497. Trin. 7 W. 3. B. R. Morris's Case.

19. When a deed is not in Court, no oyer can be granted; therefore when oyer is pray'd, 'tis always intended that the deed is in Court, and the words Ei legitur in hæc verba &c. are the act of the Court. 3 Salk. 119. Pasch. 9 W. 3. Anon.

20. To deny oyer where it ought to be granted, is error, but not e contra; therefore we ought either to grant, or to enter the denial upon record, that they may assign it for error. If the plaintiff will contest it, he may strike out the rest of the pleading and demur, in order to obstruct the oyer. 2 Salk. 498. per Holt Ch. J. Mich. 2 Annæ, B. R. Longavill v. Illeworth.

21. If release be pleaded, and the plaintiff crave oyer of it, and the defendant will not grant it, plaintiff may sign judgment for want of a plea. 6 Mod. 122. Hill. 2 Ann. B. R. Anon.

S. P. Where a record of the same Court is pleaded in

abatement, and the plaintiff demands oyer of the record, and 'tis not given him in convenient time, the plea ought not to be received, but the plaintiff may sign his judgment; and ruled accordingly per Holt Ch. J. Carth. 454. Trin. 10 W. 3. B. R. Theobald v. Long.—S. P. per Cur. ibid. 457.

Mich.

Bill. 11 W. 3. B. R. *Cressher v. Wicket*.—But per Cur. on oyer demanded, unless the record is shown, the Court will set aside the judgment as irregular. 2 Keb. 275. Mich. 19 Car. 2. B. R. *Budley v. Breach*.

22. The declaration was filed the 3d November, and notice thereof, and rule to plead given the same day; on the 12th the defendant pleaded a release, with a profert in Cur. and the same day the plaintiff demanded oyer in writing, and on the 14th in the afternoon signed judgment for want of oyer; the question was, whether the plaintiff could sign his judgment on the defendant's not giving oyer according to the demand, notwithstanding the plea? Upon this point the Court were unanimously of opinion, that in case a defendant pleads with a profert, and oyer is demanded, and not given in a reasonable time, the plaintiff may sign his judgment\*, it being esteemed as no plea till verified by oyer; and they held the judgment to be regular. Rep. of Pract. in C. B. 95. Mich. 7 Geo. 2. *Blaxland v. Burges's widow*.

\* Without applying to the Court to set aside the plea. Barnes's notes in C. B. 167. S. C.

### (B) Given, of what Thing.

1. *Attaint*, the defendant demanded oyer of the original writ, upon which &c. Herle said, he shall have oyer of the record, but not of the original, no more than in writ of error, for he himself was party to it. Br. Oyer de Records, pl. 19. cites 7 Aff. 5. and 12 Aff. 2. accordingly.

Defendant pleaded a tender ante diem imprisonment. brevis originalis. Plaintiff in his re-

plication set forth an original purchased before the time of the tender pleaded. It was moved for defendant for oyer of the original; but the motion was denied. The Court never makes any rules for oyer of originals which are matters of record. Barnes's Notes 247. Trin. 11 & 12 Geo. 2. *Ford v. Burnham*.

2. In *assise*, after the assise is awarded, the defendant shall not have oyer of the deed by which the plaintiff made his title to the office; quod nota bene. Br. Oyer de Records, pl. 20. cites 7 Aff. 12.

3. *Petition was sued by the Earl of Kent, because the King had granted 40 l. rent of the same plaintiff his ward, and yet within age, to J. M. in fee, upon false suggestion*, that the land came into the King's hands by the attainder of R. F. and had *scire facias* against J. M. who came and demanded oyer of the original, viz. of the petition; & non allocatur; quod nota. Br. Oyer de Records, pl. 9. cites 21 E. 3. 47.

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4. *Warranty of charters*, the plaintiff counted of a *seoffment with warranty by deed*, the defendant demanded oyer of the deed, and had it. Quod nota. Br. Oyer de Records, pl. 35. cites 24 Ed. 3. 35. 74.

5. *Scire facias upon an office found for the King, to say why the land shall not be seized into the King's hands, and livery made to the heir now plaintiff*. The defendant demanded oyer of the office, and was ousted; because the effect of it was comprised in the writ. Br. Oyer de Records, pl. 22. cites 30 Aff. 27. [*Arundel v. Ufford*.]

6. *Redisseisin* is returned served by the Sheriff, and writ issued against the defendant to have execution; the defendant demanded oyer of the record of *assise*; & non allocatur. Br. Oyer de Records, pl. 23. cites 30 Aff. 35.

7. A man leased for 8 years, and he in reversion granted the tenements by fine, and the consuee brought *quid juris clamat*; the defendant said that a stranger, and not the consuee leased to him for 8 years, and died, and the tenements descended to J. and S. who released to the tenant in fee, *absque hoc*, that the consuee had any thing in the tenements at the day of the note levied; and the plaintiff demanded oyer of the release, and had it not; because he was a stranger to it. Quod nota. Br. Oyer de Records, pl. 5. cites 3 H. 4. 3.

8. *Ravishment of ward* by three executors; the defendant shall not have oyer of the testament; and the reason seems to be, because *trespass* is supposed to be of his own possession. Br. Oyer de Records, pl. 7. cites 7 H. 4. 2.

B. P. Ibid.  
pl. 32. cites  
20 E. 4. 8.

9. A man brought *scire facias* upon a recovery of an annuity, and the defendant demanded oyer of the deed of annuity upon which he recover'd; and because the action is founded upon the record, and not upon the deed, therefore he could not have oyer of the deed. Per Cur. nota. Br. Oyer de Records, pl. 1. cites 3 H. 6. 40.

10. Cui in vita, the defendant alleged that he was in by descent, and prayed his age; the demandant alleged devise by the father to his son, now tenant, to hold in tail, the remainder over in fee, judgment, &c. and the tenant demanded oyer of the testament. And per tot. Cur. he shall not have it; for it belongs rather to the tenant who is in by the devise, than to the demandant. Br. Oyer de Records, pl. 2. cites 3 H. 6. 46.

Mortdun-  
essor; the  
tenant made  
default and  
resummons  
is awarded  
returnable  
&c. there;  
per Cur. the  
tenant shall  
not have  
oyer of the  
resummons;  
for it is only  
mesne pro-  
cess. Br. Oyer de Records, pl. 18. cites 2 Aff. 11.—

11. In debt, they were at issue, and at Nisi Prius the parol was put without day by protection; and after within the year, by a repeal, the plaintiff brought resummons, with habeas corpora, and the defendant prayed oyer of the resummons, and could not have it; per tot. Cur. for the resummons is only to re-deliver the plea in the same plight as 'twas before the parol was put without day, and therefore attend the issue; for he shall not plead a-new, unless in a special case: but if he had had released after the last continuance, it seems that he shall plead it; and so he may without oyer of resummons. Br. Oyer de Records, pl. 3. cites 3 H. 6. 56.

Br. Oyer de Records, pl. 18. cites 2 Aff. 11.—*Contra* of resummons to revive the plea, which be without day, or re-attachment. Br. Ibid.

12. In replevin, the defendant avowed for rent devised to him in mortmain by the custom of London by testament. Fulthorp demanded oyer of the testament. Per Strange, It belongs to the executor; as a feme who demands dower of the rent granted to her baron, shall not shew the deed; for it belongs to the heir. Br. Oyer de Records, pl. 10. cites 7 H. 6. 1.

13. *Quare imp.* the plaintiff made title by gift in tail of a manor, and advowson appendant, and descent, and composition, between him, issue in tail, and his younger brother, to present by turn; and the defendant demanded oyer of the composition, and could not have it; because 'twas only a conveyance. Br. Oyer de Records, pl. 15. cites 14 H. 6. 15.

14. *False imprisonment*; the defendant justified by precept of Justices of Peace to him directed to imprison the defendant for forcible entry, and for retaining of certain land; the defendant prayed oyer of the precept, & non allocatur: by which the defendant passed over. Br. Oyer de Records, pl. 13. cites 21 H. 6. 5.

15. Debt by executor of executor, viz. *D. brought action as executor of C. who was executor of B. who was executor of one A.* and 'twas of a debt due to the first testator; and the defendant demanded oyer of all the testaments, and 'twas said that he should have it. Br. Oyer de Records, pl. 27. cites 5 E. 4. 35. S. P. *ibid.*  
pl. 34 (*bis*)  
cites 14 H.  
6. 5.

16. Debt upon escape against wardens of the Fleet upon a recovery, and the body in execution and escaped. Young demanded oyer of the record of the recovery; & non allocatur; for 'tis only a conveyance; for the action is not founded upon that, but upon the escape. Br. Oyer de Records, pl. 29. cites 7 E. 4. 13. So of Maintenance.  
*ibid.*

17. Formedon in remainder, the tenant demanded oyer of the deed of remainder, who shewed the deed, which proved the remainder to be entailed upon condition; and exception thereof taken, because the demandant said nothing of the condition, nor alleg'd it to be performed; & non allocatur; for the deed of remainder is shewn, and 'tis of no other effect but to make demandant to be answered; whereupon it was order'd that he should answer; and the tenant demanded a copy of the deed; & non allocatur. Br. Done &c. pl. 23. cites 3 H. 7. 13.

18. *Qu. imp.* and declar'd of the grant of the next avoidance. The defendant demanded oyer of the deed, and plaintiff shews a letter wrote to his father by the patron, in which he wrote that he had given him the next avoidance, and on this 'twas demurr'd; and rul'd clearly, without argument, against the plaintiff; for 'twas a meer mockery, and the grant cannot be granted without deed. Cro. E. 163. Mich. 31 and 32 Eliz. C. B. Crisp's Case.

### (C) Given, How, and the Effect thereof.

1. *SCIRE Facias* upon record of an annuity, the defendant shall not have oyer of the deed; for the action is founded upon the record; quod nota. Br. Monstrans, pl. 145. cites 20 E. 4. 8.

2. In *assise*, the tenant pleaded a gift to him, remainder to the King by deed inrolled; the plaintiff prayed oyer of it, and had it; and he prayed that it might be inrolled *de verbo in verbum*, and so it was. Br. Oyer de Records, pl. 24. cites 1 H. 7. 28.

3. The tenant demanded oyer of the deed in formedon in remainder, which was shewn; and 'twas upon condition, and yet  
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well; and *no copy granted* of the deed to the tenant. Br. Oyer de Records, pl. 25. (bis) cites 3 H. 7. 13.

4. Tho' *indictments* are in Latin, yet they shall be read to the prisoners in English, or in such language as they understand. Sid. 85. pl. 13. Trin. 14 Car. 2. B. R. The King v. Vane and Lambert.  
 \* So where one pray'd delivery of a copy of indenture set forth in debt on obligation, and oyer demanded, the Court granted it as usual, on oath that he hath not any indenture, though it was opposed, because he had *pleaded the indenture specially*. 2 Keb. 3a. pl. 72. Trin. 18 Car. 2. B. R. Anon.

[ 162 ] 5. In debt upon an obligation conditioned to deliver up goods in a schedule annexed, the defendant demanded oyer of the condition, and thereupon pleaded, that no schedule was ever delivered, to which the plaintiff demurred. The Court conceived, that on demand of oyer of the condition they shall have oyer also of the schedule, they being all as one deed. 2 Keb. 4. pl. 8. Pasch. 18 Car. 2. B. R. Waterman v. Adams.

6. But on oyer of indenture for performance of covenants, he shall not have oyer of the covenants, but yet must set them forth; and if he have no counterpart, he \* may move the Court, and so obtain it. 2 Keb. 4. pl. 8. in Case of Waterman v. Adams.

7. In debt for *scavage*, the plaintiff pleaded the *patent of E. 4. and shewed only an exemplification* according to 13 Eliz. cap. 6. which the Court held ill, and should at least be pleaded as an exemplification only, or prout per exemplificationem patentium apparet. 3 Keb. 491, 492. pl. 34. Trin. 27 Car. 2. B. R. London (City) v. Decosta.

8. There may be a demurrer to the writ for any insufficiency in the writ after oyer thereof, and that it is entered of record as well as for variance between the count and the deed whereon it is founded. 2 Lutw. 1644. in a nota there, in the Case of SIMPSON v. CARTSIDE cites Pl. C. 73. b. WIMBISH v. LD. WILLOUGHBY, and D. 341. pl. 51. and Thelwal's Digests, where the forms of demurrers in such cases are mentioned.

9. If upon pleading a deed a protest be made of it, it shall remain in Court all the Term, and no longer, if it be not controverted; but letters of administration shall not be kept in Court all the Term; because the administrator may have other actions pending, and it would be a prejudice to him. See 36 H. 6. 30. And giving of oyer is the act of the Court, and therefore to be done by the *prothonotary in his office*, where now the course is to do such things as were done in Court, when the pleadings were ore tenus at the bar; and an attorney ought not to do it; per Cur. 12 Mod. 598. Mich. 13 W. 3. Roberts v. Arthur.

10. Formerly all demands of oyer were in Court, as it is now in case of appeals; but now it is demanded and granted between the attorneys, and where there ought to be oyer, one is not bound to plead without it; and if one attorney in time demands oyer of

of the other, and he tells him the writ is filed, and that he may take it, it is well; but sure he cannot without such consent enter a demand and a giving of oyer; for if attorneys are admitted so to do, they will set forth the matter falsely; which though it could not ensnare the other side, because they may produce the right writ &c. and have it entered, yet it would be very tedious and inconvenient; as if a deed be pleaded, it remains in Court all that Term, yet one cannot go to the officer and take oyer of it without leave of Court, or of the attorney; and the very form of pleading shews it must be upon demand; and oyer of writ is in order to object to it; per Powel J. 6 Mod. 28. Mich. 2 Ann. B. R. Longvill v. Hundred of Thistleworth.

11. If *A.* gives bond by the name of *B.* he may plead misnomer, and the other may reply, that he made the bond by the name of *B.* and estop him by demanding judgment, if against his own deed he shall be admitted to say his name is *A.* and then he may rejoin and say, that he made no such deed; but this he must do without oyer; for if he prays oyer, he admits his name to be *B.* 1 Salk. 7. Mich. 3 Ann. B. R. Linch v. Hooke.

12. In debt upon a bond, the defendant demanded oyer of the condition, which was to perform covenants in an indenture, and then demanded oyer of the indenture; and the plaintiff gave it him, *omitting an indorsement, which was made before the execution of the deed*; upon this oyer the defendant pleaded performance; the plaintiff replied, and set forth the indorsement, and pray'd judgment for the variance; and per Cur. the plaintiff was not obliged to give oyer of the indenture, and though he did, yet being what he need not do, the setting it forth is not at his peril, as where he is obliged to set it forth; nor is he concluded to say, that there is more contain'd in the indenture, but is at liberty, as well as if the defendant himself had set it forth; and the Court held, that as the defendant was bound to set it forth, so he was bound to supply this omission, and make his plea compleat; and for this judgment was given for the plaintiff. 2 Salk. 498, 499. Mich. 3 Ann. B. R. Cook v. Remington.

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(D) *Demanded.* In what Cases it may or must be demanded; and how.

1. DEBT upon recognizance acknowledged in Canc. or in any other Court, defendant cannot demand oyer of the condition; for the recognizance is not in Court as an obligation is when debt is brought upon it. But if debt be brought upon a recognizance acknowledged in this Court, then the defendant may demand oyer of the recognizance. Poph. 202. Mich. 2 Car. B. R. Chambers's Case.

2. Defendant may plead without oyer if he pleases; for he may take upon himself to remember it without hearing it. L. P. R. tit. Oyer &c. cites 18 April, 1654. B. S.

In debt on obligation the defendant pleaded, that the condition was to pay a less sum by a day, and that before the day he paid it in satisfaction; but per Cur.

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Cur. this is an ill plea, having not demanded oyer of the condition. 3 Keb. 708. pl. 43. Mich. 28 Car. 2. B. R. . . . . v. Clatch.

Keb. 937. pl. 54. Trin. 17 Car. 2. S. P. Coxall v. Sharp. 3. In *debt* upon an *obligation* for necessaries, no oyer being demanded, it is *intended a single bill*. Keb. 182. pl. 91. Mich. 14 Car. 2. B. R. Ruffel v. Lea.

4. In *covenant* the defendant demanded no oyer, but *pleaded quod in articulis illis ulterius continetur &c.* The Court held this to be ill, and his *shewing the counterpart is not sufficient*, but the whole indenture ought to be in Court; and the plaintiff had judgment nisi. Keb. 513. pl. 88. Pasch. 15 Car. 2. B. R. Prilland v. Cooper.

5. Debt on bond conditioned to perform covenants; if the defendant *pleads performance without demanding oyer*, it is a good cause of demurrer. Vent. 37. Trin. 21 Car. 2. B. R. Tapscot v. Wooldridge.

6. One cannot take advantage of an *original*, though never so *vicious* in recital, without craving oyer of it; per Holt. 12 Mod. 35. Pasch. 5 W. & M. Anon.

7. *Case* on several promises on original; defendant, without craving oyer of the writ, pleaded a *variance between the writ and the count*, shewing particularly wherein; whereupon plaintiff demurred; for tho' the writ be in Court, yet is on a distinct roll from the count; and no advantage can be taken of it, without craving oyer; quod Cur. concessit, and a respond. ouster awarded. 12 Mod. 189. Pasch. 10 W. 3. Brag v. Digby.

[ 164 ] 8. In *covenant* by an apprentice for not teaching him four several trades in an indenture of apprenticeship mentioned. The defendant, *instead of craving oyer of the plaintiff's indenture sets forth an indenture of his own*, and pleads a performance of the covenants therein. Upon demurrer, the plaintiff had judgment; for the defendant cannot shew any other indenture, but crave oyer of the indenture declared on. 6 Mod. 154, 155. Pasch. 9 Annæ B. R. Foxon v. Mosely.

9. Declarations, pleas, replications, and other pleadings; and also oyer of writs, bonds, and other deeds, shall be demanded *by a note in writing*. Rules and Orders in C. B. Mich. 2 Geo. 1. 1727.

### (E) Demanded, by whom.

But where T. brought attaint of false oath in ass against the baron and A. and the baron and A. made default; and the writ was received, and demanded oyer of the writ and of the record, and had it. Br. Ibid. cites 50 Ass. 4.

1. *Attaint against the same person who recover'd*; he himself shall not have oyer of the record, and yet he shall have advantage of the variance. Br. Oyer de Records, pl. 36. cites 12 Ass. 2. and M. 6. E. 3 accordingly..

2. *Quare non admittit* lies against the bishop after recovery, and yet the bishop shall not have oyer of the record; for he is a stranger

stranger to it, and cannot answer to it. Br. Oyer de Records, pl. 40. cites 16 E. 3. and 4 E. 3.

3. In *detinue*, the defendant prayed garnishment, and had it; and the *garnishee* appeared and prayed oyer of the writ, and had it. Br. Oyer de Records, pl. 11. cites 8 H. 16.

8 P. Br. Count, pl. 35. cites S. C. But 'twas said

that the plaintiff shall not count ~~now~~ against him. *Nunc.*

## (F) Demanded or given, at what Time.

1. *IN scire facias in Chancery* the defendant had oyer of the record, and they are at issue, and the record sent into Bank to be tried; and after the plaintiff is nonsuited, and then brings another *scire facias*, the defendant shall have oyer of the record again; for nonsuit was the act of the plaintiff. Br. Oyer de Records, pl. 41. cites 24 E. 3. 35.

2. *Debt upon recovery* by the plaintiff against this defendant in writ of entry of 10l. damages; Moyle demanded oyer of the record; and because the declaration was the first day of the term, and the defendant imparled till the end of the term, therefore he was ousted to have oyer of the record; because he demanded oyer of the record at this day, and not at the commencement of the term. But Newton in a manner affirmed, that if he had demanded oyer of the record the first day, he should have had oyer of the record. Br. Oyer de Records, pl. 14. cites 22 H. 6. 38.

3. *Debt upon obligation*; the defendant imparled; he shall not have oyer of the obligation nor condition at the next day, by reason of the imparlance; wherefore the defendant, by policy alleged variance, viz. that the obligation was *yeoman*, and the writ *malt-man*, and well; for the obligation remains always in Court, and therefore he may plead variance after imparlance, and in another term. Contra of testament, this shall be but once shewn; and by this means the plaintiff shewed the obligation again, and then the defendant saw it, and pleaded the condition performed, which cannot be without seeing it; and so policy to see it. Br. Oyer de Records, pl. 16. cites 38 H. 6. 2.

S. P. Ibid. pl. 39. cites 19 H. 6. 7. — When any deed is shewn to the Court, it remains by judgment of law in Court all that term, but at the end of the term (if it be not

deny'd) the law adjudges it in custody of the party; for all the term in law is but one day. But when the term is ended, (there being no officer to whom the custody and charge of it belongs) the party shall have the custody. And where it appears by 38 H. 6. 2. a. b. that because the deed in another term is in the custody of the party, and not in Court, the defendant shall not have oyer of it; and with this agrees 4 H. 7. 18. and 21 H. 7. 30. b. This was the first resolution 5 Rep. 74. b. Mich. 35 and 36 Eliz. B. R. in Wymark's Case.

4. *Debt upon arrears of annuity*, the defendant demanded oyer of the deed, and could not have it, because 'twas after imparlance. Br. Oyer de Records, pl. 17. cites 39 H. 6. 21.

So in debt for scavage duty, oyer of the letters patents pa-

ments, by which it was granted, cannot be demanded after imparlance. Freem. Rep. 400. pl. 524. Mayor &c. of London v. Bre [als. Gorec.]

5. *Debt upon a lease of a corody*; the defendant imparled to another term; there he shall not have oyer of the deed in the other

*other term*, by reason of the continuance. Br. Monfrans, pl. 144. cites 20 E. 4. 10.

6. Note, 'twas held that in *debt upon obligation*, if the *defendant imparles*, he *shall not say after, that the obligation has a condition, and plead the condition &c.* because he did not demand oyer of the obligation and condition before imparlance. Br. Oyer de Records, pl. 25. (bis) cites 4 H. 7. 10.

7. Tho' a man may *plead without oyer* of the bond &c. if he pleases, yet if he does so, *he cannot after wave his plea, and demand oyer of it.* L. P. R. tit. Oyer of a deed &c. cites 18 Ap. 1654. B. R.

S. P. agreed by Holt Ch. J. because imparlance is always to

8. Oyer ought not to be granted *after imparlance.* 2 Lev. 142. Trin. 27 Car. 2. B. R. In Case of Mayor &c. of London v. Gorree.

to another term. 6 Mod. 28. Mich. 2 Ann. B. R. In Case of Longville v. Thistleworth Hundred.—Oyer of deeds must be demanded the same term that they are Curiz prolat: but if after, by the course of the Court, the plaintiff may bring in his bond when he will. Keb. 32. pl. 85. Pasch. 13 Car. 2. B. R. Anon. —But by Hale Ch. J. on *assignment of variance between the patent &c. and the declaration*, in the name of the corporation, or any other small variance, the defendant may have oyer at any time; but else not after imparlance. But adjournatur, this being said the course in B. R. &c. 3 Keb. 480. pl. 19. London (City) v. Gorree.—Ibid. 491. pl. 33. S. C. And there Hale Ch. J. said, that oyer in B. R. after imparlance is too late; nor is *exemplification* sufficient, where the patent itself is pleaded.—See (G) S. C.

If the defendant in a plea of land, would have oyer of the deed, he must demand it before imparlance; for by imparling, he undertakes to defend the land mentioned in the plaintiff's count, and it would be absurd in him to defend what he does not know. G. Hist. C. B. 143.

In B. R. oyer of a deed may be demanded *after imparlance.* 12 Mod. 97. Trin. 3. W. 3. Anon.

9. One can't demand oyer of a deed but *during the time that 'tis in Court*; and this is for all the term in which it was produc'd in Court, in Case of Simpson v. Garfide. 2 Lutw. 1644. in a nota there, cites 5 Rep. 74. Wimark's Case.

10. Where a *record of the same Court is pleaded in abatement*, and the plaintiff demands oyer of that record, and it is *not given in convenient time*, the plea ought not to be receiv'd, but the plaintiff may sign his judgment; and the rule was, that unless the defendant gave oyer of the record *the next day*, judgment should be for the plaintiff. Carth. 454. Trin. 10 W. 3. B. R. Theobald v. Long.

S. P. 2 Salk. 498. per Holt Ch. J. in S. C.

11. There shall be no oyer *after a plea in abatement*, per tot. Cur. for the true reason of oyer is, that the defendant may demur and shew some cause; as a variance between it and the register &c., and that amounts to a plea in abatement, or to plead some matter in abatement, and cited Co. Ent. 320. that after plea in abatement over-rul'd, the defendant has no more to do with the original. 6 Mod. 28. Mich. 2 Ann. B. R. Longvill v. Thistleworth Hundred.

\*S. P. ibid. pl. 96. Hill. 7 Geo. 2. [ 166 ] Hartly v. Varny.—Barnes's Notes 230. S. C. acc.

12. A motion to set aside a judgment, because signed too soon after oyer demanded; the Court said, that the defendant is to demand oyer *\* before rule to plead is out*, and that he hath one day after to plead. Rules in C. B. 74. East. 5 Geo. 2. Littlehales v. Smith.

(G) Plead-

(G) Pleadings.

1. *In debt on a bond for performance of covenants*, the defendant cannot now pray oyer as heretofore, but *must plead to the indenture*, which shall be produc'd to the Court. Keb. 104. pl. 111. Trin. 13 Car. 2. B. R. Anon.

2. *In debt against an administrator upon a bond of his intestate* the defendant demanded oyer of the bond and condition & ei legitur; the condition was for performance of covenants in an indenture made between the plaintiff and the intestate; then the defendant pray'd oyer of the indenture mentioned in the condition, though it was not in Court & ei legitur, and then he pleaded, and the plaintiff demurred [generally] so that the indenture was not in Court; it should have been produced by the defendant under the hand and seal of the \* plaintiff, and where it was made, and the substance thereof, that if it should be mis-recited, or a wrong deed set forth, the plaintiff might plead non est factum; now in this case he cannot plead that plea, because the defendant hath not alleged that it was the plaintiff's deed, and for that reason he cannot crave oyer of it, and get it truly entered, if it should be mis-recited; but adjudged, that upon a general demurrer, it shall be intended to be the true indenture, and that it was in Court, and that if the defendant had endeavour'd to trick the plaintiff, he might have complain'd to the Court. 3 Salk. 119, 120. Anon.

It was adjudged, that upon general demurrer the plea was good in substance, though it was not formal, and that this manner of pleading was aided by the statute 27 Eliz. cap. 5. upon the general demurrer. But that otherwise it should be upon special demurrer; but the Court

agreed, that the defendant in this case ought to have shewn the deed, and not the plaintiff by the law; nevertheless, judgment was given for the defendant, quod querens nil capiat per billant. 1 Saund. 9. Mich. 13 Car. 2. Jevens v. Harridge.—\* Intestate. 1 Saund. 9.—Saunders at the end of the case cites 7 E. 4. 1. that the plaintiff in such case ought to shew the indenture, but says, it seems this is not law at this day.

3. *In debt on condition to perform covenants in an indenture*, to pay 300l. and to repair as three shall award; the breach assign'd was, that award was made, but defendant had not repair'd; defendant pray'd oyer of the indenture and also of the award; the indenture was set forth truly, but the award was set forth untruly; whereupon there was a demurrer. Then it was mov'd for the plaintiff to set aside this oyer, which per Cur. is irregular; and if the award be not truly set forth at first, the defendant might traverse it, but cannot pray oyer of any thing not in Curia prolat. and the Court set it aside. 3 Keb. 716. pl. 1. Hill. 28 Car. 2. B. R. Sands v. Thomlinson.

4. *In action for a duty called shewage* [scavage] the plaintiffs declared upon the grant of E. 4. by letters patent; the defendants demanded oyer, and the plaintiffs in their replication demurred, quia placitum prædictum minus sufficiens &c. and per Cur. the replication is naught; for he says, placitum prædictum est minus &c. and there was no plea pleaded; for the demanding of oyer is no plea, and therefore a repleader was awarded. Freem. Rep. 400. Trin. 1675. Mayor and Commonalty of London v. Bre.

1 Lev. 142. S. C. by the name of the Mayor of London v. Gorey, that this was no plea, and therefore does not warrant the repleader

demurrer in such form; and therefore judgment was given for the defendant, and did not award a repleader

repleader as was desired. — 3 Keb. 480. pl. 19, 491. pl. 33. S. C. by name of London (City) v. Gorce says, a repleader was awarded giving oyer.

\* 5. In *debt on bond*, the defendant demanded oyer of the obligation, and the condition which was for performance of articles, and then pleaded the articles, and that he had performed them; plaintiff pray'd that the articles be inrolled in hæc verba, which being done, the plaintiff demurred generally, and shew'd, that defendant in pleading the articles had omitted part of them; and thereupon the opinion of all the Court was against the defendant; for perhaps the plaintiff would have assigned breach upon the things omitted, which now he cannot do; judgment for the plaintiff; and North Ch. J. remember'd a Case in B. R. accordingly. 3 Lev. 50. Pasch. 34. Car. 2. C. B. Hudson v. Spier.

S. P. Sand.  
316. 317.  
Mich. 21  
Car. 2.  
Smith v.  
Yeomans.

6. In *debt upon bond* condition'd for performance of covenants in an indenture; the defendant prayed oyer of the condition, and pleads, that he hath the indenture in Court, and that there are no covenants therein to be perform'd, et hoc &c. The plaintiff pray'd oyer of the indenture, which was entered in hæc verba; and it appearing that there were several covenants therein to be perform'd, he demurred to the defendant's plea, and adjudged good; for upon oyer of the indenture it is \* made part of the defendant's plea, so that it appearing judicially to the Court, that he did plead a false plea, and averred against the truth of what appeared by the indenture; therefore the plaintiff needs not shew any matter of fact in his replication to maintain his action, but it is more proper for him to demur. 3 Salk. 120. Pasch. 9 W. 3. Anon.

\* Show.  
Parl. Cases  
217. in  
Case of the  
King v.  
Chester  
(Bishop) and  
Pearce.

7. In *debt on bond*, dated 27 April, 2 Ann. defendant pray'd oyer of the original, which bore teste 16 April, 2 Anne, whereupon defendant pleaded, that the original was sued out before the date of the bond. The plaintiff replied, that the writ upon which he declared was another writ, and then sets it forth; the defendant rejoind'd by way of estoppel because of the oyer aforesaid; the plaintiff demurred, and concluded in bar, and defendant join'd in demurrer. Trevor Ch. J. and Nevil and Blencow J. held the replication good; for the writ being fil'd, the reading of it is the act and office of the Court, and shall not conclude the plaintiff from shewing the true writ; and that this is not like to oyer of a deed, the reading of which is the act of the plaintiff himself, and therefore shall not be admitted to say, that the deed so read to the defendant is not the deed upon which he counted; but Tracy J. held, that when the defendant pray'd oyer of the writ, and it was read to him, this was the act of the Court, and when it is entered upon the record, the plaintiff shall not be admitted to say, that this is not the true writ, and so falsify the act of the Court; but had the writ been mistaken, the plaintiff's attorney, upon delivery of the paper book, ought to have rectify'd it, or have applied to the Court to rectify it; but after it is recorded, he is estopped to say, that it is not the true writ. 2 Lutw. 1641. 1644. Trin. 2 Annæ. Simpson v. Garfide.

8. Where

8. Where there is a *variance* between the original and the count, or the bond, and an oyer prayed, there the variance may be pleaded. G. Hist. C. B. 42.

(H) Pleadings. *At what Time after Oyer given.*

1. A Motion to set aside a judgment, for that the defendant's attorney demanded oyer of the bail-bond, and the plaintiff signed judgment the same day; the plaintiff's council insisted, that there was a rule given, a plea demanded in writing, and oyer not demanded till the rule was out, and judgment signed eight hours after oyer given. The Court set aside the judgment, and held, that the defendant ought to have a reasonable time, after oyer, to plead, but did not settle the time. Rep. of Pract. in C. B. 72. East. 5 Geo. 2. Hammond v. Horner.

2. In this Case the single question was, whether the defendant should have the same time to plead after oyer given, as he had at the time oyer was demanded? The Court held he should, and set aside the judgment, which was signed the next day after oyer given, the oyer being demanded two days before the rule was out. Rep. of Pract. in C. B. 81, 82. Mich. 6 Geo. 2. Theedham v. Jackson. [ 168 ] Notes in C. B. 155. 156. S. C.

3. So a rule to shew cause why judgment should not be set aside; it appeared, the rule to plead was given on Monday the 24th of October, and was out the Thursday after: oyer was demanded on the Wednesday, and given on the Thursday, and judgment was signed on the Friday in the afternoon: Curia; the plaintiff's attorney should have staid, and not signed it till Saturday in the afternoon, for the defendant shall have the same time to plead after oyer given, as he had when oyer was demanded. Rep. of Pract. in C. B. 143. Mich. 11 Geo. 2. Simpson v. Duffield and his wife, administrators.

[For more of Oyer of Records, Deeds &c. see *Fastis*, and other proper Titles.]

## Parceners.

## (A) Of what Thing there may be Parceners.

There is an  
ancient book  
case in 23  
H. 2. tit.  
Partition  
18. in these  
words, viz.  
Note, if the  
earldom of

[1.] IF an *Earl* in fee dies, having issue two daughters, they shall be coparceners of the dignity, and shall be as one Countess, and the dignity does not cease till a new creation.

23 H. 3. Partition. 28.

Adjudged. Co. Da. 1. County Palatine, 61. b. Bracton de acquirendis rerum dominiis, 76. b.]

*Cheser* descend to coparceners, It shall be divided between them as well as other lands, and the eldest shall not have this feignory and earldom entirely to herself; quod nota; adjudg'd per tot. Cor. By this it appears that the earldom, i. e. the possessions of the earldom shall be divided, and that where there are more daughters than one, the eldest shall not have the dignity and power of the earl, i. e. to be a countess; in that case the King, who is the sovereign of honour and dignity, may for the uncertainty confer the dignity on which of the daughters he please, and this has been the usage since the Conquest, as it is said. Co. Litt. 165.

In Ireland three palatinates were created in the time of H. 2. the first in Leinster, which was granted to the Earl Strongbow thro' all this province; the second in Meth, granted to Sir Hugh de Lacy the elder; the third in Ulster, granted to Sir Hugh de Lacy the younger; but after, when William the Marshal of England, having married the daughter and heir of Strongbow, had issue five sons and five daughters, and the five sons being dead without issue, the feignory of Leinster descended to the five daughters, upon partition made between them, each had an entire county allotted to her, viz. the county of Catherlough was allotted to the eldest, the county of Wexford to the second, the county of Kilkenny to the third, the county of Kildare to the fourth, and the territory of Leix, which is now the Queen's County, to the fifth; and upon this each of them had a several county palatine, and all the liberties and prerogatives in her several purparty, as Strongbow and the Marshal had in the intire feignory of Leinster. As if three parceners are of a manor, who make partition, each of them shall have a manor and court-baron within her purparty. 26 H. 3. 4. Dav. 61. b. Trin. 9 Jac. in Case of the County Palatine.

[2. The same is of a *barony*. Bracton 76. b.]

3. If a man have *reasonable estovers*, as houseboote, heyboote, &c. appendant to his freehold, they are so intire as they shan't be divided or parted between coparceners. Co. Litt. 164. b.

4. If a *corodie incertain* be granted to a man and his heirs, and he has issue divers daughters, this corodie shan't be divided between them. But of a *corodie* certain partition may be made. Co. Litt. 164. b.

[169] 5. A *piscary incertain*, or a *common fauns nombre*, can't be divided between coparceners; for that would be a charge to the tenant of the soil. *Homage and fealty* could not be divided &c. Co. Litt. 164. b.

Godb. 17.  
Ld. Mount-  
joy v. Jd.  
Hunting-  
don.

6. The Lord Mountjoy seized of the manor of Canford in fee, did by deed indented and inrolled, bargain and sell the same to Brown in fee, in which indenture this clause was contained: Provided always, and the said Brown did covenant and grant to and with the said Lord Mountjoy his heirs and assigns, that the

Lord Mountjoy, his heirs and assigns, might dig for ore in the lands (which were great waists) parcel of the said manor, and to dig turf also, for the making of allom. And in this case three points were resolved, 1. That this did amount to a grant of an interest and inheritance to the Lord Mountjoy, to dig &c. 2. That notwithstanding this grant, Brown and his heirs and assigns might dig also, and like to the case of common sauns nombre. 3. That the Lord Mountjoy might assign his whole interest to one, two or more; but then if there be two or more, they could make no *division* of it, but work together with one stock: neither could the Lord Mountjoy &c. assign his interest in any part of the waste to one or more; for it might work a prejudice and a surcharge to the tenant of the land; and therefore if such an *uncertain inheritance* descend to two coparceners, it can't be divided between them. Co. Litt. 164. b. Lord Mountjoy's Case.

7. The dignity of the *Crown of England* is without all question descendible to the eldest daughter alone, and to her posterity; and so it has been declared by act of parliament; for *regnum non est divisibile*. And so was the descent of Troy:

*Præterea sceptrum, Ilione quod gesserat olim  
Maxima natarum Priami.*

VIRG. ÆNEID. l. 657.

Co. Litt. 165.

8. A *rent-charge* is entire and against common right, yet may it be divided between coparceners; and by act in law the tenant of the land is subject to several distresses, and partition may be made before seisin of the rent. Co. Litt. 164. b.

9. *Castles* of habitation for *private use*, that are not for the necessary defence of the realm, ought to be parted between coparceners as well as other houses, and wives may be thereof endowed. Co. Litt. 165.

### (A. 2) *Who* are.

1. **P**arceners are where a man seised in fee or tail has issue only daughters, or dies without issue, and leaves sisters &c. and the tenements descend to such daughters or sisters &c. and they enter, they are called parceners, because they are compellable by writ *de partitione facienda*, to make partition; and all of them are but one heir to their ancestor, and yet they have moieties &c. in the land descended. Hawk. Co. Litt. 248. (163.)

2. *Men descending of daughters* may be coparceners as well as women, and shall jointly implead and be impleaded. Co. Litt. 164. b.

3. If two coparceners are of a use before 27 H. 8. and they continue the use *by sin descents*; and after the statute 27 H. 8. is made, there is no doubt but that they have several moieties as they had before. Mo. 92. pl. 228. Trin. 10 Eliz. in Symonds's Case.

(B) *Par-*

(B) Parteners. [*Entry by the one. In what Cases it shall enure so as that the other may enter with her.*]

*Tenant in tail alien'd to fee, and had issue two daughters, and dy'd, and the one enter'd upon the fee, claiming to herself and to her sister; the fee was ousted her, and she brought assise and recover'd, by which her sister enter'd with her, and she ousted her, and the sister brought assise, and recovered by award quod mirum! for by reason of the discontinuance, the recovery of the first sister was only by conclusion between her and the fee, to which record the other sister was a stranger; therefore it seems it is not law that the other sister may recover the moiety with her, the discontinuance not being purg'd. Br. Remitter, pl. 43. cites 21 Aff. 19.*

[1. IF one coparcener enters upon the discontinuance of her father, and upon ouster by the discontinuance brings an assise, and recovers by false verdict, the other may enter and hold in coparceny with her. 21 E. 3. 32. 21 Aff. pl. 19. adjudged.]

Br. Entre Cong. pl. 32. cites S. C. — Contrary where the one coparcener releases her part or alien's it, and the other recovers her moiety after summons and severance. Br. Coparceners, pl. 2. cites 19 H. 6. 45. — But where two coparceners seized in tail alien, and have issue and die, the issue of the one shall have action alone, and the issue of the other the like; and there where the one recovers, the other cannot enter with him. Br. Coparceners, pl. 2. cites 19 H. 6. 45.

2. Where two coparceners are heirs after discontinuance or abatement, and the one brings an action, as formedon, or such like, in the name of both, the one is summon'd and sever'd, the other recovers one moiety, and enters by execution, the other may enter with her into it. Br. Coparceners, pl. 2. cites 19 H. 6. 45.

Br. Remitter, pl. 12. cites S. C. — S. P. Per Martin, Br. Judgment, pl. 141. cites 10 H. 6. 9 & 10. And then the other may have a new action in name of both. — And so see that where no possession is but in the one only, then right only does not remit without lawful possession also. Br. Entre Cong. pl. 33. cites 19 H. 6. 59.

3. Where there are two coparceners, and they bring formedon, and the one is summon'd and sever'd, and the other sues and recovers the moiety, the other may enter with her. Br. Entre Cong. pl. 33. cites 19 H. 6. 59.

(B 2) Entry of the one, to what Purposes it shall be said the Entry of the other.

1. ENTRY of the one coparcener does not give seisin to the other, where she enters in her own interest only; quod nota; for the release of the one coparcener of all her right to her sister countervails entry and feoffment, if the one enters in the name of both, but if she enters in her own name only, then it is only an extinguishment of the right. Br. Counterple de Voucher, pl. 29. cites 21 E. 3. 27.

2. Where one coparcener enters claiming to her and her companion, this vests seisin in both; per Fisher. Br. Entre Cong. pl. 37. cites 24 E. 3. 42.

3. Barren

3. *Baron and feme seised in tail, the baron made a feoffment and had issue two daughters who had issue two sons; the baron died; the feme enter'd upon the feoffee of his assent claiming at his will and died; and the two daughters died, and one son enter'd upon the feoffee, claiming to the use of him and his companion; the feoffee brought assise against him who enter'd only, and recover'd by award; for the feme by her entry was no disseisoress, and then she did not die seised of an estate of inheritance, so that the heir may be re-mitted.* Quod nota. Br. Entre Cong. pl. 37. cites 24 E. 3. 42.

*And where the entry is not lawful, there the claim to him and his companion does not vest seisin in his companion, and e contra where the entry is lawful.* Br. Entre Cong. pl. 37. cites 24 E. 3. 42.

4. *The entry of one coparcener into the whole land is not the entry of both to all intents; for where there were two sisters, and the one who enter'd had issue and died, and the other died without issue, and a stranger abated, and the issue of the other had formedon of the one moiety, and made himself heir to his mother, who infimul tenuit with another sister, and another writ of the other moiety, and made herself thereof heir to his grandfather;* quod nota. Br. Coparceners, pl. 8. cites 40 E. 3. 8.

*And yet it is said elsewhere, that [ 171 ] the entry of the one is the entry of both as to the stranger; nevertheless otherwise it is between themselves; for upon the entry of the one the other may have a nuper obiit*

Br. Coparceners, pl. 8. cites 40 E. 3. 8.

5. *Where lands descend to two coparceners, and the one enters, it is the entry of both, and by it both may have an assise.* Per Fencote and Kirton; quod non negatur. Br. Coparceners, pl. 1. cites 43 E. 3. 19.

*But per Cur. the entry of the one is not the entry of both in respect*

*of making both the sons in gavelkind to be vouch'd as one heir, and the reason seems to be because it is for their disadvantage to make them to render in value.* Br. Coparceners, pl. 1. cites 43 E. 3. 19.—*So where they were disseisors, and the disseisee re-enter'd and the one enter'd after, it is not the entry of both; contrarium supra, where it is for their advantage to bring assise upon good title to gain the land.* Br. Coparceners, pl. 1. cites M. 1 H. 6. 5.—*When one coparcener enters generally and takes the profits, this shall be accounted in law the entry of them both.* Co. Litt. 243. b.

## (C) Of what Things Coparceners may be, and How, Things indivisible.

1. **I**F a villein descend to two coparceners, this is an intire inheritance, and albeit the villein himself cannot be divided, yet the profit of him may be divided; one coparcener may have the service one day, one week &c. and the other another day or week &c. Co. Litt. 164. b.

2. *Likewise an advowson is an intire inheritance, and yet in effect the same may be divided between coparceners; for they may divide it to present by turns.* Co. Litt. 164. b.

3. *Regularly the eldest shall have the reasonable esovers, common, piscary, corodie uncertain &c. and the rest shall have a contribution, i. e. an allowance of the value in some other of the inheritance &c.* Co. Litt. 165.

*But if the common ancestor left no other inheritance to give any thing in allowance, if the esovers, piscary &c. be uncertain, then shall one coparcener have the esovers &c. for a time, and the other for the like time; as the one for one year and the other for another,*

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another, or more or less time, whereby no prejudice can grow to the owner of the soil. Co. Litt. 165.—Or in case of the *piscary* one may have one fish and the other a second &c. or the one may have the first draught, and the second the second draught &c. Co. Litt. 165.

4. And if it be a *park*, one may have the first beast, and the second the second &c. Co. Litt. 165.

5. And if of a *mill*, one to have the mill for a time, and the other the like time, or the one one *toll dish*, and the other the second &c. Co. Litt. 165.

6. There is a difference between a *dignity* or *name of nobility*, and an *office of honour*; for if a man hold a manor of the King to be *HIGH Constable of England*, and he dies having issue 2 daughters, and the eldest daughter takes *husband*, he shall execute the office solely; and before marriage it shall be exercised by some sufficient *deputy*; and all this was resolved by all the Judges of England, in the Case of the D. of Buckingham. Co. Litt. 165.

[ 172 ] (D) Age. *Where one shall have the Privileges of her Age, and that, tho' the other be above Age.*

1. IF one of them be of full age and the other within age, the shall have her age and other privileges and advantages that an heir within age shall have; and when they are demandants for the *homage* of the one, the parol shall demur against them both. Sunt autem plures participes quasi unum corpus in eo, quod unum jus habent, & oportet quod corpus sit integrum, & quod in nulla parte sit defectus. Co. Litt. 164.

2. If a man have a *judgment* given against him for debt or damages, or be bound in a recognizance and dies, his heir within age, or having 2 daughters, and the one within age, no execution shall be sued of lands by *elegit* during the minority, *albeit the heir is not specially bound, but charged as tertenant*. Co. Litt. 290.

3. In quare impedit it was held, that if an *advowson* descend to 4 coparceners, and after the death of their ancestor the church is void; if they cannot agree in *presentment*, the incumbent of the eldest sister shall be received and inducted; and so at the 2d time the incumbent of the 2d sister, & sic de singulis. Keilw. 1. Mich. 12 H. 7. Anon.

(E) *What Privilege the Eldest, or her Issue, shall have in Partition.*

1. *ENITIA pars* is personal to the eldest, and this prerogative or privilege descends not to her issue, but the next eldest sister shall have it. Co. Litt. 166. b.

2. If the parceners agree that the eldest sister shall make partition of the tenements in manner aforesaid, and if she does this,

then it is said that the eldest sister *shall chuse last* for her part, and after every one of her sisters &c. Co Litt. f. 245.

3. So a diversity is to be observed between this case of a *partition in deed* by the act of the parties, (for there the privilege of election of the eldest daughter *shan't descend* to her issue) and between the case *where the law gives the eldest any privilege without her act*, for there that privilege shall descend: as if there are diverse coparceners of an *advowson*, and they *can't agree to present*, the law gives the first presentment to the eldest; and this privilege shall descend to her issue, nay her assignee shall have it, and so shall her husband that is tenant by the courtesy have it also. *Cujus est divisio alterus est electio*. Co. Litt. 166. b. Kelw. 1.

4. Littleton rightly collects upon the form of the judgment, that the sheriff shall deliver to them such parts as he thinks good, and that the eldest coparcener shall have *election*, when the partition is made by the sheriff. Co. Litt. 168.

(F) Where they shall be *deem'd in Law as one Heir*, and to what Purposes they are said to have several Freeholds.

1. AN advowson descends to three coparceners infants, and before presentment by any of them, a stranger usurps; it seem'd to the Court that usurpation should be upon all; for one right descended to them, and they may join in the presentment. [ 173 ]  
21 E. 3. 31.—And tho' upon a disagreement between them, the eldest may present; yet it is but a privilege which the eldest daughter may waive. Tr. 20. Car. 1. C. B. Rot. 1849. Hoy v. Blevy.

2. Albeit where there are two coparceners, they have two moieties in the lands descended to them, yet are they both but one heir, and one of them is not the moiety of an heir, but both of them are but unus hæres. Co. Litt. 163. b.

3. If a man makes a lease for life, the remainder to the right heirs of A. being dead, who has issue two daughters, whereof the one is attainted of felony, in this case some have said that the remainder is not good for a moiety, but void for the whole; for that both the daughters should have been (as Littleton says) but one heir. Co. Litt. 163. b.

4. As they be but one heir and yet several persons, so they have one entire freehold in the land, as long as it remains undivided in respect of any stranger's praeice; but between themselves in judgment of law they have to many purposes several freeholds; for the one of them may infeoff the other of them of her part, and make livery. Co. Litt. 164.

(G) Where they shall be said *seised in Coparcenary of Rent*.

Br. Coparceners, pl. 6. cites S. C.—D. 153. pl. 14. in Case of Hunt v. Ellistiden.

1. *IF three coparceners make partition, and the one grants 20 s. rent to the two for equality of partition, this rent shall be of the nature of coparcenary; and if the one of them dies, the rent shall not survive, but go by moieties in nature of coparcenary.* Br. Rents, pl. 8. cites 15 H. 7. 14. per Frowike & Vavifor J.

Mich. 4 & 5 Ph. & M. cites S. C.—S. P. Because the rent comes in recompence of the land, and therefore shall ensue the nature thereof. And if the grant had been made to them two of a rent of 20 s. viz. to the one 10 s. and to the other 10 s. yet shall they have the rent in course of coparcenary, and join in action for the same. Co. Litt. 169. b.—The coparcener that has a rent granted to her for owelty of partition, shall be said to have it in the same manner as if it descended to her from the common ancestor. Co. Litt. 177. b.—5 Rep. 8. a. in Justice Windham's Case, cites 38 E. 3. 26. b. per Knivet Chief Justice and Chancellor.—S. P. And tho' the words are joint, yet the cause of the grant shall be respected, and the rent shall be of the quality of the land. 5 Rep. 8. a. per Curiam, in Justice Windham's Case. Mich. 31 & 32 Eliz. B. R. cites 15 H. 7. 14. a.—S. P. 29 Aff. 23.—Hob. 171. in Case of Stukely v. Butler, cites S. C.

2. If two coparceners, by deed indented, *alien both their parts to another in fee, rendering to them two and their heirs a rent in fee out of the land, they are not jointenants of this rent, but shall have the rent in course of coparcenary, because the right of the land out which the rent is reserved, was in coparcenary.* Co. Litt. 169. b.

3. Two coparceners make a lease reserving rent, they shall have this rent in common, as they have the reversion; but if afterwards they grant the reversion excepting the rent, then they shall be jointenants of the rent. Fin. Law 8vo. 9.

## [ 174 ] (H) Severance. What is; and Reviv'd, in what Cases.

1. *IF two coparceners are in fee, and the one makes a lease for life, this is no severance of the coparcenary; for notwithstanding, the Lord shall make one avowry upon them both: otherwise of jointenants.* Co. Litt. 192.

2. If land descends to two coparceners who enter, and after the one aliens her part, and then retakes an estate in fee, the coparcenary between them is determined, for she is now in of other estate. Br. Coparceners, pl. 5. cites 11 H. 4. 21.

S. P. Br. Coparceners, pl. 3. cites 37 H. 6. 8.—S. P. per Knivet, Br. Joinder in Action, pl. 59. cites 34 Aff. 15.—S. P. Co. Litt. 164.—S. P. If no partition be between them before;

3. Where two coparceners are disseised, and the one has issue, and dies, there the one shall have action of the one moiety, and the issue of the other shall have writ of entry sur disseisin of the other moiety; and when they have recover'd and had execution, they shall be coparceners as before. Br. Joinder in Action, pl. 43. cites \* 39 H. 6. 8. per Cur.

but

but contra where partition is made, or if she alone aliens her part, tho' she retakes it again by purchase. Br. Several Præcipe, pl. 1. cites S. C. — \* So it is in all the editions of Brook; but it seems to be misprinted, and should be 37 H. 6. 8. a. pl. 16.

(I) Acts. *What Acts they may do the one to the other.*

1. IT was doubted if one coparcener might *enfeoff* her companion: but per Brian, she may. Br. Feoffment de Terres, pl. 45. cites 10 E. 4. 3. Ibid. pl. 75  
S. P.

(K) What Act of one shall go in Benefit of the others.

1. IN quare impedit an *advowson* descended to four coparceners, and when it came to the second sister's turn to present, she suffered an *usurpation*; and it was moved for a question whether this usurpation suffer'd shall put the third coparcener to any prejudice; and by the opinion of the Court and of the Bar, it shall not be any prejudice to the third sister, but that she shall present when it comes to her turn, and so of the fourth: and it was said that by the presentment of the third or fourth after the usurpation had to the turn of the second, the usurpation is avoided, and the second sister, when it comes to her turn, may present; and the reason of Wood J. was, because all of them have but one joint title; so that upon any disturbance made to the turn of any of them, they are to join in an action, then when an usurpation is had at one time to the turn of one of them, and after at the turn of another a presentation and induction is had; and by another of the sisters at her turn, this induction is the restitution to all; because their title is joint for the cause aforesaid, and so the usurpation before had, clearly avoided; and the same coparcener, who was at one time out of the possession of her presentment by the said usurpation, when it came again to her turn, was clearly remitted. But if \* partition be made by composition between the said coparceners, otherwise it would be, per Wood; for then tho' the third coparcener presents †, as well she may, notwithstanding the usurpation suffered by the second sister, now by her presentment the second shall not be remitted, but is put to her writ of right of advowson in her own name only, by reason of the partition. Keilw. 1. a. b. Mich. 12 H. 7. \* 4 Le. 222,  
223. cites  
24 E. 4.  
Contra per  
Brian, That  
if an ad-  
vowson de-  
scends to 4  
coparce-  
ners, and  
they make  
partition to  
present by  
turns, and  
the third  
presents  
when the se-  
cond ought,  
for that  
time the  
presentment  
is gone; but  
when it  
comes to his  
turn again,  
he shall  
present.—  
† See 2  
Vent. 39.  
Pasch. 25  
Car. 2. C. B.  
Anon. where  
the Court  
[ 175 ]  
inclined to  
an opinion

that such usurpation put all out of possession, and would not permit a special verdict, but a case was made of it for the consideration of the Judges.

2. If two jointenants be disseised, and the one of them makes continual claim, and dies, the survivor shall take benefit of his continual claim in respect of the privacy of their estate. Co. Litt. 252.

(L) Ouster. *What shall be said a Disseisin by one of the other.*

Br. Brief,  
pl. 259.  
cites S. C.

1. **L**AND sometimes meadow and sometimes pasture descended to A. B. C. D. and E. sisters in coparcenary, and upon a partition a moiety was allotted to E. who died seised thereof, and it descended to W. her heir, who was likewise seised. J. S. purchased the part of the other four sisters, and claiming four parts in five of the land, cut the grass leaving one fifth part of the hay on the land, and carrying away the other four parts, which W. refused to take. And in assise brought by W. it was held that the taking more of the profits of the land than belonged to J. S. was a disseisin. Br. Assise, pl. 121. cites 7 Ass. 10. per Herle.

2. In assise, it was found by verdict that two coparceners of a moor made purparty, and one leased his part to A. B. for life, who leased his part to three at will, who pastured the soil of the other coparcener, and cut wood, and mow'd rushes, and the other parcener voided the possession, and brought assise against the lessee for life, and against two tenants at will, and found also that the tenant at will manured the soil to the use of the lessor, but lessee for life had nothing of the profits, and that the other parcener might have taken the profits if he would; and that the lessee for life did not command his tenants to take the profits, neither did he know any thing of it, but he agreed to what they did as the jury thought, inasmuch as after he knew the tenants at will had occupied by the manner he did not cause them to make gree; and per Cur. this is no agreement; and therefore the lessee for life is no disseisor, and also one of the tenants at will is not named, who by his act is disseisor and tenant with the others, therefore by award the plaintiff took nothing by his writ. Br. Assise, pl. 345. cites 37 Ass. 8.

3. If one coparcener enters into the whole and makes a feoffment of the whole, this divests the freehold in law out of the other coparcener. Cart. 176. Hill. 18 & 19 Car. 2. C. B. cites Co. Litt. 374. a.

4. When one coparcener enters specially, claiming the whole land, and taking the whole profits, she gains the one moiety by abatement. Cart. 176. cites Co. Litt. 243. b.

5. A man cannot be disseised of an undivided moiety. 2 Salk. 423. Hill. 1 Ann. B. R. Reading v. Roylston.

Two tenants  
in common  
of an ad-  
vowson;

one alone presents; yet at the next avoidance they may join, and if they are disturbed, quare impedit lies as in the case of coparceners. Quere. And. 63. Mich. 24 & 25 Eliz. Harris v. Nichols. — Cro. E. 18 Pasch. 25 Eliz. C. B. S. C. makes a difference between grantees of coparceners, and meer tenants in common, that in the first case an usurpation of one shall not put the others out of possession, but that perhaps it would be otherwise in the last, unless they were such as derived their estates from coparceners; and yet 22 E. 3. 9. is, That between strangers in blood, or where two make composition to present by turn, if one usurp upon the turn of the other, this shall not put him out of possession; per three Justices, but Anderson doubted.

(M) *Grants by one.*

1. **T**WO coparceners were of a reversion, one granted his interest by fine to J. S. It was held that the donee shall have *quid juris clamat* for a moiety of the said reversion. 3 Le. 6. 3 Eliz. Anon.

2. Two parceners of a house, one entered generally, and made a lease for life, by the name of all that his house &c. Per two Justices, the entire house passed, and so the words intend, and by his livery he gained and granted the entire, tho' his general entry intends his entry into no more than what he had right to; but per Gawdy J. as the entry *prima facie* gains no more than what he had a right to demand, no more shall this lease: and Foster at the Bar said it was adjudged in this Court in REYNOLD'S CASE, according to the opinion of the two Justices. Cro. E. 615. Gerry v. Holford.

S. P. Ibid. 641. Arg. per Popham in Case of Hemley v. Price.

(N) *What Offence of one shall bind her Companion.*

1. **I**T is to be observed, that there is a diversity between a descent which is an act of the law; and a purchase, which is an act of the party; for if a man be seised of lands in fee, and has issue two daughters, and one of the daughters is attainted of felony, the father dies, both daughters being alive, the one moiety shall descend to the one daughter, and the other shall escheat. Co. Litt. 163. b.

But if a man makes a lease for life, the remainder to the right heirs of A. being dead, who has issue two daughters,

whereof the one is attainted of felony, in this case some have said the remainder is not good for a moiety, but void for the whole; for that both the daughters should have been (as Littleton says) but one heir. Co. Litt. 163. b.

(O) *Where Feoffee of one shall have Aid of the other.*

1. **I**F one parcener makes a feoffment in fee, and after her feoffee is impleaded, and vouches the feoffor, she may have aid of her coparcener to *dereign a warranty* paramount; but never to recover *pro rata* against her by force of the warranty in law upon the partition. Co. Litt. 174.

2. In some cases the feoffee of one coparcener shall have aid of the other parceners to *dereign the warranty* paramount, and therefore if there are two coparceners, and they make partition, and the one of them infeoffs her son and heir apparent, and dies, the son is impleaded; albeit he be in by the feoffment of his mother, yet shall he pray in aid of the other coparcener to have the warranty paramount; and the reason of the granting this aid is, because the warranty between the mother and the son is by law annulled, and therefore the law gives the son (tho' he is in

by seoffment) to pray in aid of the other parcener to dereign the warranty paramount. Co. Litt. 174.

3. If a man be seised of lands in fee, and has *issue two daughters*, and makes a gift in tail to one of them, and dies seised of the reversion in fee, which descends to both sisters, and the donee or her issue is impleaded; she shall not pray in aid of the other coparcener, either to *recover pro rata*, or to dereign the *warranty paramount*; because the other is a stranger to the estate tail, whereof the eldest was sole tenant, and partition never was or could be thereof made. Co. Litt. 174. b.

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(P) *Actions by one against the other.*

1. **W**HERE there are three parceners who make partition, and one has an equal part, and another has too much, and the third too little, he who has too little shall sue alone against him who has too much only, and the first who has equal shall not be party; for he did no wrong. Br. Error, pl. 131. cites 42 Aff. 22.

2. An assise of *darrain presentment* doth not lie between parceners when one of them *usurps in the turn of another*; because of the *privy* which is between them, and the words of the writ are against him that deforces the advowson. Jenk. 2. pl. 1. cites 20 E. 3. 15 E. 3. Fitzh. Darrain Presentment.

3. But one parcener may have a *quare impedit against another*, when her turn is disturb'd by the other parcener. Jenk. 2. pl. 1. cites F. N. B. 34.

4. One cannot have *mortdancefor* against the other. See F. N. B. 196. (L)—But may have a *nuper obiit*. See F. N. B. 197 (A) &c.—And so of a *rationabili parte*. F. N. B. 2. (B) &c.

(Q) *Actions against others. In what Actions they shall join.*

Br. Assise, pl. 59. cites S. C.—  
\* Orig. (matter.)

S. P. And the tenant shall not be charged to both; quod nota. Br. Brief, pl. 303. cites S. C.

1. **W**HERE two daughters are heirs, and the one enters, and one who has no right ousts her, and she brings assise in her name alone, and all this matter found by \* verdict; and because she hath right against all who hath not right, therefore the recovered by award. Br. Entre Cong. pl. 59. cites 26 Aff. 2.

2. *Assise of rent by E. the defendant said that the plaintiff had nothing uniefs in common with J. S. daughter of A. sister of the plaintiff who is alive, not named, judgment of the writ; and if &c. nul tort. It was found that M. was seised in fee of the rent, and died seised, and the rent descended to A. and E. which A. had issue J. S. and died; and J. S. was within age, and E. took her in ward, and received the whole rent to her own use, and none to the use of J. S. nor was any thing assigned to J. S. in allowance, nor had the ancestor any other land; and by award the writ*

was

was abated, by the not naming J. S. quod nota. And so see the \* seisin of one is the seisin of both; quod nota bene. Br. Joinder in Action, pl. 60. cites 36 Aff. 1. \* Orig. (fine.)

3. If land in fee simple and fee tail descend to two sisters, and they make partition, so that the one has the fee simple land, and the other the land tailed, and she who has the land tailed aliens and dies, and her issue brings formedon, and the tenant shews this matter, the issue and his aunt shall join, and the one shall recover the whole. But Brook makes a quære thereof, and says that the other sister who has the land, cannot join in the formedon, for she has her portion. But if she had alien'd the fee simple land also, before the issue of the other had brought the formedon, then it seems that both shall well join. Br. Formedon, pl. 2. cites 20 H. 6. 2. 13.

4. After partition the one heir shall have formedon alone. Per Brook. Br. Formedon, pl. 2.

5. Parceners shall join in quare impedit when a stranger presents; for he claims the whole advowson against them both. Jenk. 2. pl. 1.

Contra. For if they cannot agree, the eldest shall have

the presentation. Br. Joinder in Action, cites 5 H. 7. 8.—But if two coparceners join in quare impedit and one by covin with defendant counts falsely, and will not agree with her companion in a true count; the other may have a subpoena against her, to compel her to join and agree in the count. Br. Conscience, pl. 12. cites 6 E. 4. 12.

6. But if four coparceners of an advowson are, who present by turns, and one suffers an usurpation, they shall all join while the coparcenary continues, but not after partition made. Keilw. 1. Mich. 12 H. 7. Anon.

[ 178 ] See Presentment (M. b.) pl. 8. contra.—After com-

position to present by turns, they may join in qua. imp. 2 Inst. 365.

7. Coparcenary is not severed or divided by law by the death of any of them; for if one die, her part shall descend to her issue, and one præcipe shall be against them; for they shall never join as heirs to several ancestors in any action ancestral: but when one right descends from one ancestor, and then propter unitatem juris, tho' they be in several degrees from the common ancestor, yet shall they join. Co. Litt. 164.

But the issue of several coparceners (because several rights descend) shall never join as heirs to their mo-

thers, and yet when they have recovered, a writ of partition lies between them. Co. Litt. 164.

8. If a man has issue two daughters and is disseised; and the daughters have issue and die, the issues shall join in a præcipe; because one right descends from the ancestor: and it makes no difference whether the common ancestor being out of possession died before the daughters, or after; for that in both cases they must make themselves heirs to the grandfather, which was last seised, and when the issues have recover'd they are coparceners, and one præcipe shall lie against them. And likewise if the issues of two coparceners which are in by several descents, be disseised, they shall join in assise. C. L. 164.

But in the same case, if the two daughters had been actually seised, and had been disseised, after their decease the issue shall not join; because se-

veral rights descended to them from several ancestors. Co. Litt. 164.—And yet when they have severally recovered they are coparceners, and one præcipe lies against them. A release made by one of them

them to the other is good. Co. Litt. 164.—So note a diversity inter *defensum in capita*, and in *virgates*. Co. Litt. 164.

9. Two parceners shall have a writ of *ayel*, and by their count suppose the common ancestor to be *grandfather to the one*, and *great-grandfather to the other*. Co. Litt. 164.

10. They must join in *debt for rent*. 3 Mod. 109. Pasch. 2 Jac. 2. B. R. Anon. Obiter.

12 Mod. 86.

S. C. —

Comb. 347.

S. C. —

5 Mod. 141. S. C.—Carth. 364. Page v. Stedman. S. C. and held that if one distrains, she ought to make *consequence in her own right*, and as *bailiff to her sister for the entire rent*.

11. They must join in an *avowry*. 1 Salk. 390. Mich. 7 W. 3. B. R. Stedman v. Bates.

S. P. 12

Mod. 86. in

S. C.

S. P. So

in writ of

entry &c.

Comb. 347.

S. C.

12. Coparceners make but *one tenant to a præcipe*. Per Holt Ch. J. Comb. 347. Mich. 7 W. 3. B. R. Stedman v. Page.

13. They must join in one action of *trespass*, and so in a *mortdancesthor*, where only the right is concerned, and therefore much more in *replevin*, which goes to the right and to the possession. 12 Mod. 86. Stedman v. Page.

## (R) Actions. Joinder by them, *tho' in several Degrees.*

1. TWO brought writ of *cofinage of the seisin of W. who was great grandfather to the one*, and *great great grandfather to the other*, and yet well. And yet the *statute of Gloucester, cap. 6. wills, that where the one is of a longer degree than the other, there they shall have recovery by writ of mortdancesthor*. But see the statute is in the affirmative, and therefore it seems they may have this action also: and the same law, that two coparceners, and the heir of the third coparcener, may join in writ of entry sur disseisin. Br. Joinder in Action, pl. 117. cites 10 E. 2.

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2. Fine was levied to A. for life, the remainder to two barons, and their *femes in tail*; the tenant for life died, the two barons and their *femes had issue and dy'd before entry*, the one issue and a stranger enter'd, and the other issue brought *scire facias upon the fine of the moiety*, and good, for it was agreed that the issues in tail ought to sever in action, and not join in action; for it is a *joint gift, but several inheritance*. Br. Joinder in Action, pl. 38. cites 24 E. 3. 29.

If a man

seised of

certain land

in fee, has

issue 2 daughters

and dies, and the daughters enter &c.

and each of them has issue a son, and die

without partition made between them,

by which the one moiety descends to the son of the one parcener,

and the other moiety descends to the son of the other parcener,

and they enter and occupy in common

and are disseised, in this case they shall have in their two names *one assise* and not two assises.

And the cause is, for that albeit they come in by divers descents &c.

yet they are parceners, and a writ of partition lies between them.

And they are not parceners, having regard or respect only to the seisin and possession of their mothers, but they are parceners rather, having respect to the estate which descended from their grandfather to their mothers; for they cannot be parceners if their mo-

3. And where coparceners are *disseised they may join in action, but their heirs shall sever in action*; per Cur. Ibid.

thers

then were not parceners before &c. And so in this respect and consideration, viz. as to the first descent which was to their mothers, they have a title in parcenary, the which makes them parceners. And also they are but as one heir to their common ancestor, viz. to their grandfather, from whom the land descended to their mothers. And for these causes before partition between them &c. they shall have an assise although they come in by several descents. Co. Litt. S. 313.

4. If abatement or waft be made against two coparceners, and the one has issue and dies, the issue and the other shall join and recover the land, but the damages shall be sever'd. Br. Joinder in Action, pl. 98. cites 11 H. 4. 16.

The aunt and the niece, of disseisin done to the aunt and

sister, ought to sever in action. Br. Several Præcipe, pl. 9. cites 24 E. 3.—Aunt and niece shall have waft jointly, for waft done after the decease of the other sister, and for waft done before, the aunt may count of waft done to her own disherison only and all in one writ. Vid. Kelw. 105. b. pl. 17. cites 45 E. 3. 3. pl. 11. 35 H. 6. 23. per Fortescue, & 11 H. 4. fol. 16.

5. The aunt and the niece may join in *sur cui in vita* upon alienation made by the baron, their common ancestor, or upon recovery had against the baron and his feme. Br. Joinder in Action, pl. 105. cites F. N. B. Cui in vita.

6. If there are 2 coparceners of a reversion, and waft is committed, and one dies, the aunt and niece shall join in an action of waft. Co. Litt. 53. b.

This point of Co. Litt. was much doubted of by 3 J. For

they said, that the books cited do not warrant the opinion, and that other authorities are contra. 1 Salk. 186. 10 W. 3. C. B.—and cited \* Mo. 34, 110, 40, 127.

\* Mo. 34. pl. 110. is generally that two parceners may join in waft against their lessee. Trin. 3 Elis. Ann. and Ibid. 40. pl. 127. is agreeable to Co. Litt. 53. b.

7. Where two coparceners are, and the one has issue and dies, if the issue and the other enter and are disseised, they may join in assise, because the coparcenary continues; and so if there were 30 descents where the coparcenary continues and no partition had. Br. Joinder in Action, pl. 40. cites 9 E. 4. 14.

8. Where two tenants are in, the one as heir to his mother, in the one moiety, and the other as heir to his mother, of the other moiety, and they are to demand, they shall demand by several præcipes. Br. Several Præcipe, pl. 1. cites 37 H. 6. 8.

## (S) Where Damages recover'd jointly shall enure in [ 180 ] Severalty and not survive.

1. IF three coparceners recover land and damages in an assise of mortdancesthor, albeit the judgment is joint, that they shall recover the land and damages, yet the damages being accessory, tho' they be personal, do in judgment of law depend upon the freehold, being the principal, which is several; and tho' the words of the judgment be joint, yet shall it be taken for distributive, and therefore if two of them die, the intire damages do not survive, but the third shall have execution according to her portion. Co. Litt. 198.

But if all three had sued execution by force of an elegit, and two of them had died, the third should have had the whole by survivor till the whole damages be paid. Co. Litt. 198.

## (T) Actions

(T) Actions survive, in what Cases, or by whom to be brought after the Death of one.

1. IF two coparceners have cause to have *cessavit*, and one dies, the action is gone, for there is no survivor, and the action is real; otherwise it seems of *trespass and things personal*, Br. Jointenants, pl. 51. cites 33 E. 3. & Fitzh. *cessavit* 42.

\* The word (not) is in the original, but it seems should be omitted.—

By the term being expired, the land is in the tenant by the curtesy, and so he has no

2. In *waft* exception was taken to the writ, because two coparceners and the heir of the 3d join'd in the writ, whereas the husband of the 3d sister, being *tenant by the curtesy*, was living, and for this was cited 22 H. 6. 21, 22. But it was answer'd, that his joining would be to no purpose; for he is not to have damages, because the waft was not to his disherison, and the land he shall not recover against the defendant, the term \* being determin'd; and the Court were of the same opinion. 4 Le. 164, pl. 269. Mich. 29 Eliz. C. B. Sir Richard Lewkner's Case.

And the whole Court was of opinion, that because the term was ended, the writ was good notwithstanding the exception. Godb. 115. pl. 136. S. C. by name of Lewkner v. Ford.—S. C. and S. P. 4 Le. 226, 227.—Le. 48. pl. 62. S. C.

(U) Against them. In what Cases they must be join'd.

\* S. P. the it be after several defendants; for they are as one tenant, and one præcipe quod reddat lies against them all. Br. Coparceners, pl. 1. cites S. C.—S. P. Contra where they are in by several titles, or by partition. Br. Joinder in Action, pl. 43. cites 39 H. 6. 8.—[but is miscited, and should be 37 H. 6. 8.]

1. ENTRY in the Quibus against two of disseisin done to the demandant. The defendant demanded judgment of the writ; for the grandfather of the tenants was seised &c. and died seised, and the land descended to two daughters, who entered and died seised, and the two now tenants are in, the one as heir to his mother in the one moiety, and the other as heir to his mother of the other moiety, and so ought to have several writs or several præcipes, but the opinion of the Court e contra; \* for as long as they are in as coparceners, and in case of coparcenary, and no partition made, writ of partitione faciend' lies between them, and therefore joint præcipe lies against them. Br. Several Præcipe, pl. 1. cites 37 H. 6. 8.

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[ 181 ]

(W) Pleadings, Count &c.

And note that five parceners brought a writ and

1. ASSISE by 7 femes and 5 did not sue, by which they were summon'd and sever'd, and the 2 received to sue alone, who made their plaint of two parts of seven parts of two mesuages, two carves of land, 4 l. 1 s. 2 d. rent, and of the moiety of seven parts of

*of the same tenements cum pertinentiis, and the plaint was challenged, because they did not shew if the seven parts are the whole tenements or not; by which the plaintiff said that they were, and the plaint adjudged good. Br. Plaint, pl. 11. cites 10 Aff. 12. demanded a house, two were non-suited, and the three demanded three parts of a house divided into five parts and well. Br. Plaint, pl. 11. cites M. 17 E. 3.*

2. Affise against two coparceners; the one made default and the affise was awarded against her by default, and the other pleaded a deed of the ancestor of the plaintiff made to the ancestor of the tenant with warranty. And it was awarded that she may plead this for her moiety well enough, and for no more; quod nota. Br. Affise, pl. 469. cites 13 E. 3.

3. Four coparceners are of an advowson, and three of them grant and confirm that which to them belongs therein to the fourth, and it is no title without shewing deed; by the opinion of the Court. Br. Monstrans, pl. 47. cites 21 E. 3. 37.

4. But in replevin, the defendant avowed for a rent for equality of partition between 3 sisters reserved, and did not shew any deed of the reservation; quod nota. Br. Monstrans, pl. 3. cites 2 H. 6. 14.

5. Where avowry is for rent reserved upon equality of partition, upon partition made between two parceners, it is a good plea that they were three parceners, and that the third at the time of the partition was out of the country, and came back within age and re-enter'd, and the other said that the third after released her estate, absque hoc that she enter'd; Prist; and the others e contra. Br. Avowry, pl. 68. cites 24 E. 3. 51. 58.

6. In præcipe quod reddat, if the tenant says, that he has nothing but in coparcenary with W. N. not named, judgment of the writ, the other shall say, that sole tenant as the writ supposes, absque hoc that W. N. any thing has, and not absque hoc that he holds in coparcenary with W. N. And so upon jointenancy. Br. Issues Joines, pl. 59. cites 22 H. 6. 17.

Br. Maintenance de Brici, pl. 11. cites 22 H. 6. 16. accordingly. — Br. Traverse, pl. 295. cites

S. C. — So where they are in severally, the one shall say, that he is tenant of the moiety in severally, absque hoc that the other any thing has, and the other shall say the like for the other moiety; per Danby, quod Curia conceffit. Br. Several Præcipe, pl. 1. cites 37 H. 6. 8.

7. It is good issue that they hold in common by descent &c. and therefore it seems that it is not pregnant; quod nota. Br. Negativa &c. pl. 36. cites 36 H. 6. 19.

Br. Partition, pl. 15. cites S. C.

8. He who pleads that the plaintiff has nothing but only in coparcenary with J. N. ought to shew how, viz. That A. was seised and died seised, and they as daughters and heirs entered. Br. Coparceners, pl. 7. cites 2 E. 4. 7.

So where the defendant pleads coparcenary in himself, Ibid.

9. In ejectment brought upon a lease made by two coparceners, the declaration was quod dimiserunt; exception was taken, that the lease is the several lease of each of them for her moiety, and it was rul'd a good exception. Mo. 682. pl. 939. Mich. 42 & 43 Eliz. Milliner v. Robinson.

(T) Actions *survive, in what Cases, or by whom*  
to be brought after the Death of one.

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[ 181 ]

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6. In præcipe quod reddat, if the tenant says, that he has nothing but in coparcenary with W. N. not named, judgment of the writ, the other shall say, that sole tenant as the writ supposes, absque hoc that W. N. any thing has, and not absque hoc that he holds in coparcenary with W. N. And so upon jointenancy. Br. Issues Joines, pl. 59. cites 22 H. 6. 17.

Br. Maintenance de Brief, pl. 11. cites 22 H. 6. 16. accordingly. —Br. Traverse, pl. 295. cites in severalty, moiety; per

S. C.—So where they are in severally, the one shall say, that he is tenant of the moiety, absque hoc that the other any thing has, and the other shall say the like for the other moiety; per Danby, quod Curia conceffit. Br. Several Præcipe, pl. 1. cites 37 H. 6. 8.

7. It is good issue that they hold in common by descent &c. and therefore it seems that it is not pregnant; quod nota. Br. Negativa &c. pl. 36. cites 36 H. 6. 19.

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[ 181 ]

(W) *Pleadings, Count &c.*

And note that five parcceners brought a writ and

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*of the same tenements cum pertinentiis, and the plaint was challenged, because they did not shew if the seven parts are the whole tenements or not; by which the plaintiff said that they were, and the plaint adjudged good. Br. Plaint, pl. 11. cites 10 Aff. 12.* *demanded a house, two were non-suited, and the three demanded*  
*three parts of a house divided into five parts and well. Br. Plaint, pl. 11. cites M. 17 E. 3.*

2. Affise against two coparceners; the one made default and the affise was awarded against her by default, and the other pleaded a deed of the ancestor of the plaintiff made to the ancestor of the tenant with warranty. And it was awarded that she may plead this for her moiety well enough, and for no more; quod nota. Br. Affise, pl. 469. cites 13 E. 3.

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1. ENTRY in the Quibus against two of disseisin done to the demandant. The defendant demanded judgment of the writ; for the grandfather of the tenants was *seised &c. and died seised, and the land descended to two daughters, who entered and died seised, and the two now tenants are in, the one as heir to his mother in the one moiety, and the other as heir to his mother of the other moiety*, and so ought to have several writs or *several præcipes*, but the opinion of the Court *e contra*; \* for as long as they are in as coparceners, and in case of coparcenary, and *no partition made*, writ of partitione faciend' lies between them, and therefore joint præcipe lies against them. Br. Several Præcipe, pl. 1. cites 37 H. 6. 8.

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1 Salk. 390.  
STEDMAN  
v. BATES,  
S. C. ad-  
judg'd ac-  
cordingly;  
for by Lit-  
tleton him-  
[ 182 ]

self, both  
sisters must  
join; they  
both take as  
heir by de-  
scend, and  
make but  
one heir, to

whom the rent descends as one intire inheritance.—Carth. 364. S. C. PAGE v. STEDMAN. The defendant ought to have made consuance for the whole rent as bailiff to both sisters.—So where one sister disreins, she must avow in her own right, and also as bailiff to her sister for the intire rent, and not for a moiety only in her own right. Ibid.—Comb. 347. S. C.—S. C. cited by the Reporter. 2 Lutw. 1210, in the Case of Osmar v. Sheaf.

10. In *replevin* the plaintiff declared for taking bricks &c. The defendant made *cognizance as bailiff of one J. B. and G. his wife*, setting forth, that one S. B. was seised in fee of the lands in which &c. and being so seised, made a lease thereof to Griffith for 44 years, rendring rent; that S. B. died, and the lands descended to his daughters coheiresses, one whereof married the said J. B. and the other was the present Countess of Salisbury, and so made *cognizance for a moiety of the rent*; and upon demurrer, judgment was given for the plaintiff; because one coparcener cannot make such an avowry for a moiety of the rent *before partition*, though they have several inheritances. 5 Mod. 141. Mich. 7 W. 3. Stedman v. Page.

See Parti-  
tion (E. 2).

(X) *Where in a real Action by one Parcener against another Judgment shall be given in Severalty.*

1. IF two coparceners be, and one *disseise the other*, and the disseisee brings an *assise* and recovers, it has been said, that she shall have judgment to hold her moiety in severalty; and this seems (say they) very ancient, and thereupon vouch Bracton. (L. 4. fo. 216. b.) Si res fuerit communis locum habere potuit communi dividendo iudicium; and so (say they) if one coparcener recover against another in a *nuper obiit*, or a *rationabili parte*, the judgment shall be, that the defendant shall recover and hold in severalty. Co. Litt. 167. b.

2. But Britton is to the contrary; for he says, Et si ascun des parceners soit enget ou disturbe de sa seisin per ces autres parceners un, ou, plusieurs, al disseisee viendra assise per several pleint sur les parceners & recovers, mes nemy tener en severalty, mes en common, solonque ceo que avant le fist &c. and this seems reasonable; for he must have his judgment according to his plaint, and that was of a moiety, and not of any thing in severalty; and the sheriff cannot have any warrant to make any partition in severalty, or metes and bounds. Co. Litt. 167. b.

(Y) Equity.

1. IF two coparceners bring *quare impedit*, and the one counts a false count by covin had with the defendant, and will not agree with his companion in the true count, there his companion may have *subpœna* against him to make him agree with him; per Moyle. Br. Conscience, pl. 12. cites 6 E. 4. 10.

[For more of Parceners in general, see Aïd of a common Person, (A. 2) &c. Partition, and other proper Titles.]

\* Parish.

\* Before the council of Lateran there were no parishes. Per Flobert Ch. J. Hob. 296.—Contra by Richardson. Litt. Rep. 75.—But see Godolph. Rep. 354, 355. cap. 32. f. 8. where parishes are argued to have been before that council.—Originally the kingdom, in reference to civil matters, was divided into villis only.

(A) *What is or shall be intended a Parish or a Vill only in a Parish.*

† 1. **WHERE** a parish is *alleged generally*, this shall be intended to be a vill, and to be the same with the vill, and not to contain more villis unless it be specially alleged; but a vill and a parish is all one, and it is sufficient to allege a parish where a vill is required, as appears by diverse cases, upon *act of parliament*, called the *statute of additions*, which requires that the vill be named, yet it being alleged that he was of such a parish suffices; and for this purpose the long quinto of Ed. 4. 141. and diverse other books were cited, and 2 Inst. 669. per Holt; and therefore the alleging it at a parish suffices; for the parish of St. Giles's is a vill. Skin. 554. Mich. 6 W. & M. B. R. in Case of Wilson v. Laws.

and parishes were divisions only in reference only to ecclesiastical affairs, and the *common law took no notice of them*, inasmuch as a fine was not admitted of lands in a parish; but in process of time parishes became divisions taken notice of in reference to civil matters, and are now used in fines; and though a place spoken of simply is intended a vill, yet *statibus presumptioni donec probetur in contrarium*. Per Atkins. Freem. Rep. 228. Trin. 1677. in Case of Addison v. Otway.

† Adj. Mich. 6 W. 3. 2 Salk. 501. cites S. C.—Ibid. cites S. P. Adj. Mich. 10 W. 3. B. R. Vinckston v. Ebdon.—It shall not be intended that there is more than one parish in a city, unless the contrary be made to appear. L. P. R. tit. Parish, cites Trin. 23 Car. B. R. For some cities have but one parish. Ibid.

2. A parish may contain a whole hundred; as the parish of Taunton Dean contains the whole hundred of Taunton Dean. Arg. Skin. 560. Mich. 6 W. & M. B. R. in Case of Hicks v. Woodson.

[For more of Parish in general, see Churchwardens, Dismes, Poor, and other proper Titles.]

Parishioners.

## Parishioners.

(A) *Their Power &c.* And compellable to do what

1. PARISHIONERS may *pull down a wall* that hinders them in their way to church. Arg. Ow. 72. cites F. N. B. 185. b.

2. In things of *interest*, as in common, parishioners cannot *prescribe*; but in things of *easement*, as a way, a man may prescribe; per Owen; and per Anderson, none may prescribe but those that have perpetual continuance, and therefore tenant for years or for life cannot prescribe, but must be *aided by custom*; [ 184 ] Walmsley accordingly; for there is no descent or succession in parishioners. Owen 72. Hill. 37 Eliz. Goodway v. Michel.

3. They are compellable to *put things in decent order*; but the judgment of the *majority* is the only rule for the degrees of that decency; and the Court inclined, that a rate for that purpose is binding; as for moving the *communion table* out of the body of the church into the chancel, or raising it higher &c. Farr; 70. Mich. 1 Ann. B. R. Newson v. Bauldry.

4. Parishioners have right to view *parish books*. 11 Mod. 134. Trin. 6 Ann. B. R. Love v. Dr. Bentley.

5 Rep. 66.  
Chamberlain of London's Case.  
—1 Mod.  
194.

5. Parishioners *are a body politic* to many purposes, as to vote at a *vestry* if they pay scot and lot; they have a sole right to *raise taxes* for their own relief, without the interposition of any superior court; may make *by-laws to mend the highways*, and to make *banks to keep out the sea*, and for *repairing the church*, and making a *bridge* &c. or any such thing for the public good, and by the 3 & 4 W. 3. and 7 Anne, to tax and levy *poor rates*, and to make and maintain *fire engines*, and by 9 Geo. for purchasing *work-houses* for the poor. Arg. 8 Mod. 354. Pasch. 11 Geo. 1. Phillybrown v. Ryland.

(B) *Major-Part.* How far binding to the rest.

1. A RULE was obtained by surprize, for leave to file an *information* against E. and several other parishioners of the parish of . . . . . in Essex, for *laying a tax upon themselves for carrying on a suit* against their vicar in the Spiritual Court for *incontinency*. And the Court held they might *lawfully tax themselves* by consent, to carry on a suit *for the public good of the parish*; but in that case the majority could not bind the rest without their consent, as in case of other rates. But the information being

being filed, it was referred to the Master of the office. 12 Mod. 440. Hill. 12 W. 3. The King v. Sir Hugh Everard.

2. Whether a majority of parishioners may make a rate to bind the rest for the repairing or *adorning* the *chancel*? for that is the special freehold of the parson; Cheshire here quoted the Case of ROSE v. HAWKINS, 9 W. 3. B. R. where a libel was for a parish-rate to repair a church and chancel; and a prohibition granted for two reasons: 1. because the chancel ought to be repaired by the parson; 2. because 'twas suggested the rate was not made by a majority. Yet because they had not gone to try that point, the Court said it was no cause for a prohibition. Far. 70. Mich. 1 Annæ, B. R. Newson v. Bauldry.

[For more of Parishioners, see Churchwardens, Prohibition, Vestry, and other proper Titles.]

Park.

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(A) Matters relating to Parks.

1. A PARK signifies a great quantity of ground inclosed, privileged for wild beasts of chase by prescription, or by the King's grant. Co. Litt. 233. a.

It consists of vert, venison and inclosure, and if it be de-

termined in any of them, it is a total disparking. Cro. Car. 60. Hill. 2 Car. C. B. Howard's Case.—A park must be inclosed. Co. Litt. 233. a.

Sir Charles

2. In action upon the statute, it was agreed that a man may inclose his land, but he ought not to make thereof a park for wild beasts without licence of the King; for if he does, it shall be seised into the hands of the King; per Cur. Br. Action sur le statute, pl. 48. cites Itin. Not. Temp. E. 2.

3. 3 Ed. 1. cap. 20. f. 1. provides for \* trespassers in † parks and ponds, that if any be thereof attainted at the ‡ suit of the party, great and large amends shall be awarded, according to the trespass, and shall have three years imprisonment, and after shall make fine at the King's pleasure (if he have whereof) and then shall find good surety, that after he shall not commit like trespass.

The cause of making this statute was; that at the common law the plaintiff in an action of trespass

should, as in other cases, recover no other damages, but according to the quantity of the trespass, which the plaintiff for trespasses in parks and vivaries esteemed at a high rate; but the country com-

monly found the damages very small; for the common law gave no way to matters of pleasure, (wherein most men do exceed) for that they brought no profit to the commonwealth; and therefore it is not lawful for any man to erect a park, chase or warren, without a licence under the Great Seal of the King, who is pater patriæ, and the head of the commonwealth. 2 Inst. 199.—

\* This statute extends to no other trespasss in parks besides hunting; so that if a man does any other trespasss in a park, he is out of the danger of the statute, tho' within the words of it. Per Mountague Ch. J. Pl. C. 88. b. Hill. 6 & 7 E. 6. in Case of Partridge v. Strange.—S. P. 30 E. 3. 11. a. b. the Case of the Countess of Athol v. Walton.—2 Inst. 199. cites S. C. and says, that by the word (trespass) in this act, is understood when a man either *chaseeth* in a park, or by bow or other engine endeavours to kill some of the game of the park against the liberty and privilege of the park, and not when the Lord of a park takes beasts to agistment in his park, and the owner breaks the park, and takes them away without agreement for their pasture; for that is not within these words, de malefactoribus in parcia, because the trespasss concerneth not the liberty of the park by chasing of the game thereof, but is a collateral trespass, & sic de similibus.—† By the word (park) is understood a lawful park, whereunto three things are required. 1. A liberty, either by grant or by prescription. 2. Inclosure by pale, wall or hedge. And, 3. Beasts forages of the park. But this statute extendeth not to a nominal park erected without lawful warrant, albeit it be called a park; for this statute is very penal, and therefore, as hath been said, extendeth only to a lawful park: but he may have an action of trespasss at the common law, quare clauum fregit, & unam damam cepit &c. 2 Inst. 199.—Trespasss de malefactoribus in parks, and counted of a trespasss in the forest, and the opinion of the Court was, that the action did not lie; for the statute is taken strictly of parks; but the defendant shall be punish'd by the statute of charta de foresta, and not otherwise. Br. Action sur le Statute, pl. 16. cites 21 H. 7. 21.—Br. Parliament, pl. 72. cites S. C.—It extends not to a forest in the hands of a subject; for the law is so penal, that it shall not be taken by equity. 2 Inst. 199.—Neither does it extend to a chase. Ibid.—‡ A man shall not recover double damages, and have imprisonment of the party for three years for hunting in his park by general writ of trespasss, but by writ of trespasss which makes mention of the statute. Br. Action sur le Statute, pl. 10. cites 47 E. 3. 10.—S. P. 2 Inst. 201. For it is a maxim in the common law, that a statute in the affirmative, without any negative express'd or implied, doth not take away the common law; and therefore in this case the plaintiff may either have his remedy by the common law, or upon the statute: If he bring his action of trespasss generally, without grounding the same upon the statute, then he waives the benefit of the statute, and takes his remedy by the common law.

See pl. 6. in the notes there.

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S. 2. And if he have not wherewith to make fine, after three years imprisonment, he shall find like surety; and if he cannot find like surety, he shall abjure the realm.

S. 3. And if any being guilty thereof be fugitive, and have no land nor tenement sufficient (whereby he may be justified) so soon as the King shall find it by inquest, he shall be proclaimed from county to county; and if he come not, he shall be outlawed.

\* The King shall have the suit either by indictment, information or action of trespasss upon this act. 2 Inst. 201.

S. 4. It is provided also and agreed, that if none do sue within a year and a day for the trespasss done, the King shall have the suit.

S. 5. And such as be found guilty thereof by inquest, shall be punished in like manner in all points as above is said.

\* This is understood of hinc, oxen, sheep, and other domestic beasts within the park.

S. 6. And if any such trespasser be attainted, that he hath taken tame beasts, or other thing in his parks by manner of robbery, in coming, tarrying or returning, let the common law be executed upon him, as upon him that is attainted of open theft and robbery, as well at the suit of the King as of the party.

If there are within the park tame deer, and misdoers come to hunt and kill venison, and they kill a tame deer, and carry it away, not knowing the same to be so, this is no felony; for the intent maketh the felony, and so are the books to be understood. 2 Inst. 201.—† Robbery in this act is taken in a large sense. 2 Inst. 201.

Br. Action sur le Statute, pl. 11.

4. Trespasss against three of breaking his park, and [chasing and killing] his savages, and the one appeared and the other did not;

not; and the plaintiff counted that he broke his park, and chased and killed his savages; the defendant pleaded *not guilty*; and there it is agreed that the day is not material, but if he did it at another day, it is sufficient; and the Jury found that he came into the park to chase and kill savages (*but did not kill any of them*) to the damage of two marks, viz. 13 s. 4d. for the trespass, and 13 s. 4d. for costs; and the plaintiff prayed his judgment against him who is found guilty, and released his suit against the others; by which the Court awarded that the plaintiff recover against the defendant 40 s. viz. 13 s. 4d. for the damages, and 13 s. 4d. for costs assessed by the Jury, and 13 s. 4d. more for costs \* increased by the Court, and that the defendant be taken and imprisoned for three years, and that he make fine to the King, and at the end of the three years that he find surety for his good behaviour, and that if he cannot find surety, that he shall abjure the realm. Br. Trespas, pl. 106. cites 5 H. 5. 1.

cites S. C. Br. Costs, pl. 10. cites S. C.

\* By the words in the statute, viz. (*large amends shall be awarded*) if the damages are too small,

the Court has power to increase them; for the word (*award*) belongs properly to the Court. 2 Inst. 200.

5. In an action upon the statute for *hunting in a park*, the defendant pleaded that the plaintiff had no park there; Brudnell thought the plea good; but Shelley J. held it no plea, because an issue could not be taken thereon; for it could only be tried between the King and the plaintiff; and if land be imparked without licence, the King only can take advantage thereof; and therefore the defendant should have pleaded *not guilty*. Brook J. held that the plea was good; for if the plaintiff had no park there, then the action did not lie, and it would be dangerous to plead not guilty, since the Jury must find against the defendant, if it appeared that he was guilty of the hunting, which yet might be in a place not imparked: Inglefield thought either that plea or not guilty good. Spilman for the defendant said, that if he pleaded not guilty, it would lie upon the plaintiff to prove it to be done in a place imparked; to which Shelley agreed: sed adjournatur. Afterwards Shelley held, that for the killing only of the savages, no damages should be recovered by the plaintiff in this case; but tota Curia contra. Kelw. 202. b. pl. 1. 21 H. 8. Anon.

6. In *trespass upon this statute*, it was held that notwithstanding the Queen pardoned the offence, yet this does not tell the plaintiff of his remedy by the statute to have recompence for the trespass done him; and no action lies upon this statute but for the chasing, as it seems by the words of it, by the better opinion of the Justices at this time. Mo. 58. pl. 165. Pasch. 6 Eliz. Anon.

Dal. 60. pp. 13. is the S. C. reported in [ 187 ] the same words, but after the words (for

the chasing) follow these words, viz. (*in the ancient parks*) which are omitted in Mo. 58.—By a general \* pardon, the ransom, the finding surety that he will not commit the like trespass for the future, and the abjuring the realm for nonability of payment, is pardon'd; and then judgment is to be given for the damages, and imprisonment for three years. But quære if upon finding surety not to offend any more, he shall be discharged of finding the other surety directed afterwards. And quære if the bond not to offend any more, shall not extend to all parks, and to whom it shall be made, whe-

ther to the Queen or the plaintiff? But the Reporter says, Nota, that he saw several precedents in this action, all which were *† ad respondendum tam domino regi quam parti querenti*; and also double recital of *finding surety*, according to the words of the statute; and because this action was in the plaintiff's own name only, and the surety but once recited in the writ. Curia advisare vult: D. 238. a. pl. 34. Pasch. 7 Eliz. Lord Shandois v. Wye. — The Reporter cites a precedent H. 24. H. 7. in B. R. where the defendant a prisoner in the Marshalsea was compelled to find sureties of London and Southwark, two of London and two of Southwark in 10l. each, and himself in 40l. to the King not to offend any more &c. in any parks and vivaries, contra formam statuti; and the plaintiff acknowledged satisfaction of the damages, and defendant ibat quietus. Ibid. — And Ld Coke says, that the recognisance, sureties and condition must be in this manner. 2 Inst. 201.

† Tho' the precedents in this action are *ad respondendum tam domino regi quam parti querenti*, yet by the register he may have the action in his own name, as may be gathered from some of the books. 2 Inst. 200.

¶ It was held in B. R. that the fine and imprisonment is for the King, and not for the party, and the prisoner shall not be discharged without the King's warrant to the same Justices. Kelw. 39. a. b. Trin. 13 H. 7. — Lord Coke says, both *damages and imprisonment concern the plaintiff*, and therefore the King's pardon cannot dispense with them; but the *ransom, the finding of surety*, and the *forfeiting the realm*, are punishments exemplary and concern the King, for which reason he may pardon the same. 2 Inst. 200.

7. The difference is, when the *prescription* is to pay money for all the *tithes* of such a park, there perhaps if it be *disparked*, he shall not pay any tithes; and where 'tis to pay the shoulder of every buck or doe at Christmas for all tithes of the park; there, if it be *disparked*, tithes shall be paid as of other land. Per Popham. Cro. E. 457. Pasch. 38 Eliz. B. R. in Case of Bedingfield v. Feake.

8. No subject can make a park, chase or warren within his own land for his recreation or pleasure, *without grant or licence of the King*; and if he does it of his own head, in a *quo warranto* they shall be seized into the King's hands. 11 Rep. 86. Trin. 44 Eliz. in the Case of Monopolies. — 87. b. *ibid*.

9. The *beasts of park* or chase properly extend to the buck, the doe, the fox, the martin and the roe, but in a common and legal sense to all the beasts of the forest. Co. Litt. 233. a.

10. A *prohibition* was prayed upon a suit in the Spiritual Court for *tithes* in kind of a park now *converted into tillage*, upon a surmise *de modo decimandi, to pay a buck and a doe for all tithes*. And allowed by the Court, and agreed, 1. *tho' they are fera natura*, yet they may be given for tithes. So to pay pheasants, &c.

2. Tho' they are *not tithable of themselves*, yet they may be given for *modus decimandi*, as a great tree may be given for tithe of trees tithable. 3. That that is a *discharge to the very soil*, and the park is only a liberty, and the owner may furnish it with game when he pleaseth. Noy 148. Sharpe v. Sharpe.

And Cook Ch. J. cited one Shiden's Case, that such a *modus decimandi generally for the park* is not good, if it be *disparked*. But it shall be particularly for all acres contained in the park. Noy. 148. Sharpe v. Sharpe.

Cro. Car. 60. Sir Charles Howard's Case, S. C. but not S. P.

11. If office of keeper of a park be granted to one, and after the park is *dispark'd*, he shall not have the lodge for his life, for this belongs merely to his office, and he has it merely in respect of it; but the *herbage and pannage* he shall have for his life, as the rest of his *fees*; for they are distinct things granted to him &c. He shall have it in case of the King, if he *dispark*. Per Walters Ch. B. Litt. R. 139. Mich. 4 Car.

12. None

12. None can have a park but by *grant* or *prescription*.  
6 Mod. 151. The Queen v. Dutchess of Buccleugh.

[For more of Park, see *Deer-stealers*, *Dismes*, *Trespas*,  
and other proper Titles.]

## Parliament.

### (A) Of the *Word* Parliament, and *what* will make a *Sessions*.

1. MY Lord Coke in his Littleton tells us, that it is called Parliament, because every member of that Court should sincerely and discreetly parler le \* ment for the general good of the commonwealth; and that this name before the Conquest was used in the time of Edward the Confessor, and after of William the Conqueror &c. That for the antiquity of this High Court of Parliament, it appears that diverse parliaments have been holden long before, and until the time of the Conqueror &c. Co. Litt. 110. a.—Dr. Brady in his answer to Mr. Petit's book intitled, The right of the Commons &c. says that this word Parliament came in use here instead of magnum concilium, or commune concilium & colloquium, about the middle of the reign of H. 3. and in time became of more frequent use. Sir H. Spelman too, in his Gloss. Verbo Parliamentum 452. speaking of King John says, Hoc nomen Parliamentum non tum emicuit: but in pag. 449. that great antiquary says, Reperitur (factor) vox antique in Canuti legibus, sed e recentiore interprete Anglo-Normanno, Latine data; Danis enim & Saxonibus peregrina vox.—And Mr. Prynne, in his animadversions on the 4th Inst. is very elaborate on this head, and questions very much the antiquity of the treatise so much depended upon and extolled by Lord Coke, called the Modus tenendi Parliamentum, and says it must in all probability be compiled after the reign of King H. 3. when the word Parliamentum was grown into common use, being not to be found in Glanvil or Bracton.

\* It seems that this is only a termination used in the English language, as in the words hereditament, vestment, &c.

2. If a parliament be assembled, and *divers orders made*, and a writ of *error brought*, and the record delivered to the higher house; and *divers bills agreed*, but no bills sign'd, this is but a convention, and no parliament or session, as it was Ann. 12 Jac.

in which (as it was affirmed by them which had seen the roll) it is entered, that it is not any session or parliament, because *no bill was signed*. See 33 H. 6. Brook Parliament 86. that every session in which the King signs bills is a parliament. Hut. 61. Hill. Vac. 20 Jac. Anon.

### (B) *Who may sit and have Privilege in the House of Commons.*

Dal. 58. pl. 7. S. P.—  
Jenk. 118.  
pl. 35.  
[ 189 ]

1. PER Dier, if a man be *condemn'd in debt or trespass*, and is chosen one of the burgesses or knights of parliament, and after is taken in execution, he cannot have the privilege of parliament; and so was it held by the sages of the law in the case of one FERRERS, in the time of H. 8. And tho' the privilege at this time was allowed to him, it was minus iuste. Mo. 57. pl. 163. Pasch. 6 Eliz. Anon.

2. Agreed by the lower house, that a person *arrested before he was chosen burgess* ought not to have the privilege of the house. March 12. 1592. Mo. 340. Fitzherbert's Case.

3. In the Case above, Cooke speaker cited the Case of THORP speaker, who was in the time of adjournment taken in execution at the suit of the Duke of York, and resolved, on the meeting of the parliament, that *the speaker should not have his privilege*; but they *elected another speaker*. Mo. 340.

4. Per all the Judges about the 35 Q. Eliz. *Persons outlawed* ought not to be knights and burgesses of parliament, and such persons outlaw'd may be *arrested by cap. utlag.* privilege of parliament notwithstanding, and upon this the Queen commanded that no such shall be permitted in the parliament house. And. 293. Anon.

### (C) *Privilege. Extent thereof.*

1. Defendant being burgess of parliament brought a letter from the speaker to the King's Bench to stay &c. and it was disallowed by the Court; for it ought to have been a *writ of privilege*; and it was said, when Thorp was speaker, he had a *general supersedeas* for all actions against him &c. and it was held ill; for he ought to have had a special supersedeas for every action. And that the parliament *only privileges the person of the members of it*, and stays not the proceedings of the King's Court. And so in the Case of CURTESIE v. WESTCOTT, that if A. had recovered against B. in two several actions, and had judgment &c. that B. might not have one audita querela, but ought to have several writs. Noy. 83. Hodges v. Moor.

Upon affidavit of a subpoena served, and

2. Tho' the Court will not proceed against a member that has *privilege of parliament*; yet if a parliament man sues at law, and a bill is brought here to be relieved against that action, the Court

Court will make an order to *stay proceedings at law* till answer or further order. Vern. 329. Trin. 1685. Anon.

no answer coming in, an *injunction* was granted

against the defendant being a parliament man, but it was ordered not to enter an *attachment* against him. 3 Ch. R. 21. per Ld. Keeper Bridgman 1665. Anon.

3. At a trial at bar, wherein mention is made of privilege of parliament, Holt said, That whereas it is said in our books, that privilege of parliament was not allowable in *treason, felony, or breach of the peace*, that it must be intended where security of peace is desired, that it shall not protect a man against a *supplicavit*; but it holds as well in case of *indictments* or *informations* for breach of peace, as in case of actions. 12 Mod. 108. Mich. 8 W. 3. The King v. Culpepper.

4. 12 & 13 W. 3. cap. 3. s. 1. enacts, That any person may prosecute any suit in any of his Majesty's Courts at Westminster, or Chancery, or Exchequer, or the Dutchy Court, or in the Court of Admiralty, and in all causes matrimonial and testamentary in the Court of Archers, the Prerogative Courts of Canterbury and York, and the Delegates, and all Courts of Appeal, against any Lord of Parliament, or any of the knights, citizens and burgesses of the House of Commons, or their servants, or any other person intitled to privilege of parliament at any time immediately after the dissolution or prorogation of parliament, untill a new parliament shall meet, or the same be reassembled, and immediately after any adjournment of both Houses for above 14 days, untill both Houses shall meet; and the said Courts may, after such dissolution, prorogation, or adjournment, proceed to give judgment, and to make final decrees and sentences, and award execution thereupon, any privilege of parliament notwithstanding.

The process against any Member of the House of Commons during the time in this act mentioned out of the said Courts, being in a special manner directed by this statute by summons, by

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S. 2. Provided that this act shall not subject the person of any of the knights, citizens, and burgesses, or any other person intitled to privilege of parliament, to be arrested during the time of privilege; nevertheless if any person having cause of action or complaint against any Peer, such person after any dissolution, prorogation, or adjournment as aforesaid, or before any Sessions of Parliament, may have such process out of his Majesty's Courts of King's Bench, Common Pleas and Exchequer, against such Peer, as he might have had out of time of privilege; and if any person have cause of action against any of the knights, citizens, or burgesses, or any other person intitled to privilege of parliament, after any dissolution, prorogation, or such adjournment &c. such person may prosecute such knight, citizen, or burgess, or other person intitled to privilege, in his Majesty's Courts of King's Bench, Common Pleas, or Exchequer, by summons and distress infinite, or by original bill and summons, attachment and distress infinite, which the said respective Courts are empowered to issue untill they enter a common appearance or file common bail; and any person having cause of suit or complaint, may, in the times aforesaid, exhibit any bill or complaint against any Peer, or against any of the said knights, citizens, or burgesses, or other person intitled to privilege, in the Chancery, Exchequer, or Dutchy Court, and proceed thereupon by letter or subpoena as usual, and upon leaving a copy of the

distress infinite, or by original bill, summons, attachment and distress infinite, till the defendant shall appear and file common bail &c. And this being against privileged persons, the usual practice is, when an action is brought against such privileged person, to file a bill in nature of a special *capias*, and then to summons him, and if he appears

upon such  
summons,  
then the  
plaintiff  
may declare  
against him,  
as in cus-  
todia maris-  
balli, to

which declaration he ought to answer without any imparlance. And in the principal case, the defendant having appeared upon the summons, and filed common bail, it was now moved, that he might have no imparlance over to the next term. It is admitted, that this suit was against a member of parliament, and that if he was not a privileged person, he might have an imparlance of course to the next term, since the declaration against him was not delivered before crastino animarum. That if a special original is brought against a person who has no privilege, he must likewise have an imparlance of course; and it would be a very proper method to leave those who had no privilege, and those who were privileged, upon the same footing. As to the act of parliament mentioned on the other side, it has no manner of influence on the practice of the Court, it only appoints a method to bring privileged persons to appear. But admitting that the plaintiff might proceed in this case, as by special original, yet that would not be a reason against granting an imparlance; because the summons is still general, and so is the capias; and it is not the special original, but the special capias which hastens the proceedings; and it would be very hard to take this as a case, where a special capias is allowed to be the first summons, therefore it was insisted for the defendant, that he might have leave to imparl. The Court was of opinion, that the proceedings in this case should be like those in most other cases, and not to be influenced by the state of either party; and that if they are founded on a special original, then there lies an imparlance of course till the next term. 8 Mod. 228, 229. Hill. 30 Geo. 1724. Wadsworth v. Handyside.

S. 3. *Where any plaintiff shall by reason of privilege of parliament be stayed from prosecuting any suit commenced, such plaintiff shall not be barred by any statute of limitation, or nonsuited, dismissed, or his suit discontinued for want of prosecution, but shall upon the rising of the parliament be at liberty to proceed.*

S. 4. *No suit or proceeding in law or equity against the King's original and immediate debtor for the recovery of any debt originally and immediately due unto his Majesty, or against any person liable to render account unto his Majesty for any part of his revenues, or other original or immediate duty, or the execution of any such process, shall be impeached or delayed by privilege of parliament; yet so that the person of such debtor or accountant, being a Peer, shall not be liable to be arrested, or being a member of the House of Commons, shall not, during the continuance of privilege, be arrested by any such proceedings.*

[ 191 ] S. 5. *This act shall not give any jurisdiction to any court to hold plea in any real or mixt action, in other manner than such court might have done before.*

5. 2 & 3 Ann. cap. 18. s. 1. enacts, That any suit may be commenced and prosecuted in any of her Majesty's Courts of Westminster against any officer or person employed in the revenue, or any other place of public trust, for any misdemeanor or breach of trust relating to such office or trust, or any penalty imposed by law to enforce the due execution thereof; and no such suit or execution thereupon, altho' such officer be a Peer, or of the House of Commons, or otherwise intitled to privilege of parliament, shall be stayed by privilege.

S. 2. *Nothing in this act shall subject the person of such officer, being a Peer, to be arrested; nor subject the person of such officer, being of the House of Commons, to be arrested during the time of privilege;*

lege; and against such person being of the House of Commons, shall be issued summons and distress infinite, or original bill, summons, attachment and distress infinite, which the respective courts are impowered to issue untill the party appear.

6. The Roman Senators had a priviledge of being sued only in their superior courts. But if a Senator had committed a base crime, he had then so debased himself, as that he should be subject to the jurisdiction which he had offended; per Dr. Floyd. Arg. 11 Mod. 83. Trin. 1706. in Case of Willimot v. the Chancellor of Worcester.

7. It was moved for a *sequestration Nisi*, for want of an answer, against a menial servant of a Peer of the realm, as the first process for contempt, in the same manner as in case of the Peer himself; and tho' the motion was granted by the Master of the Rolls, yet the Register refused to draw it up; as thinking it against the course of the Court. Upon which it was moved again before the Ld. Chancellor, who upon reading the statute, granted the motion likewise, it appearing to be both within the meaning and words of the statute; and if it were not so, as it was plain no attachment would lie against their persons, consequently there would be no remedy against them; and they would have a greater privilege than their Lord, if the process against such menial servants were to be a subpoena. 1 Wms's Rep. 535. Hill. 1718. Anon.

2 Wms's  
Rep. 385.  
Lord Clif-  
ford's Case.

8. 11 Geo. 2. cap. 24. s. 1. enacts, That any person may commence and prosecute in Great Britain or Ireland, any suit in any Court of Record or of Equity, or of Admiralty, and in all causes matrimonial and testamentary in any Court having cognizance, against any Peer of Great Britain, or against any of the knights, citizens, and burgeses of the House of Commons of Great Britain, or against their menial or other servants, or any other person intituled to the privilege of the parliament of Great Britain, immediately after the dissolution or prorogation of any parliament, until a new parliament shall meet, or the same be re-assembled, and immediately after any adjournment of both Houses for above 14 days, until both Houses shall re-assemble.

8. 2. This act shall not subject the person of any of the House of Commons, or any other person intituled to privilege of parliament, to be arrested during the time of privilege; nevertheless it shall be lawful for any of the Courts of Great Sessions of Wales, Courts of Session in the Counties Palatine of Chester, Lancaster, and Durban, Courts of King's Bench, Common Pleas, and Exchequer in Ireland, after any dissolution, prorogation, or such adjournment, or before any Sessions of Parliament, or Meeting of both Houses, to use such proceedings, and to issue the like process against any such Peer, or against any of the said knights, citizens, and burgeses, or other persons intituled to the privilege of the Parliament of Great Britain, as the Courts of King's Bench, Common Pleas, and Exchequer in England, are by 12 & 13 Will. 3. cap. 3. impowered to use, and it shall be lawful for the Chancery of Ireland, and the Court of Equity in the Exchequer there, to use such proceedings, and to issue the like process against the

the persons aforesaid, as the Chancery of Great Britain, and the Exchequer in England, are by the said act impowered to use; and it shall be lawful for any of the other Courts before described, the process whereof is not particularly directed by the said act, or by this act, after any dissolution, prorogation, or such adjournment as aforesaid, or before any Session of Parliament, or Meeting of both Houses, to issue like process against any such Peer, or any of the said knights, citizens, or burgesses, or other person intitled to the privilege of parliament, as such Courts may now lawfully issue against persons not liable to be arrested.

S. 3. Where any plaintiff shall by privilege of parliament be stayed from prosecuting any suit commenced, such plaintiff shall not be barred by any statute of limitation, or nonsuited, dismissed, nor his suit discontinued for want of prosecution, but shall upon the rising of the parliament be at liberty to proceed to judgment and execution.

S. 4. No proceeding in law or equity against the King's original and immediate debtor for the recovery of any debt originally and immediately due unto his Majesty, or against any person liable to render account unto his Majesty for any part of his revenues, or other original and immediate duty, shall be stayed in any Court in Great Britain or Ireland, by privilege of the Parliament of Great Britain; yet so that the person of such debtor or accountant, being a Peer of Great Britain, shall not be liable to be arrested upon such suit, or being a Member of the House of Commons of Great Britain, shall not, during the continuance of the privilege of parliament, be arrested upon any such proceedings.

S. 5. This act shall not give jurisdiction to any court to hold plea in any real or mixt action, in other manner than such court might have done before.

#### (D) Power as to imprisoning, and Effect of Pro-rogations &c.

1. **T**HE Queen commanded Egerton her solicitor to attend in parliament upon the Lords in their house. The parliament began, and after he had attended three days, was chose burgess for Reading, and upon the return of it, the Commons come into the upper house, and there demand that he may be dismissed of the attendance there, and be sent to them into the lower house; but there upon consultation, and defence made by himself, he was retained; because not being an inhabitant or free of the borough he may choose if he will serve at the election or not for the borough, the which he expressly refused to do. And another reason; because he was attendant in the upper house before he was chose member of the lower. Third reason; because the Queen has the option to have him of the upper house if she will, as she has commanded him. Mo. 551. Egerton's Case.

#### 2. Burgess

2. Burgess of the lower house was, upon prorogation of parliament, made the Queen's solicitor, and at the day of the re-summmons was commanded by writ to attend in the House of Lords, at which time the lower house chose him Speaker, and came into the upper house and challenged him, and demanded to have him, and it was granted; because he was member of the lower house before that he was commanded by the writ to attend in the upper. So diversity between this case and the case above. Mo. 551. cited as 5 Eliz. Ousley's Case.

3. Upon a hab. corp. the return was, that *he was taken by order of the House of Peers for contempt*, and now the House of Peers being prorogued, it was held per Curiam, that *their orders are all at an end*, and every other thing, except *\* writs of error and scire facias upon them*. Lev. 165. Pasch. 17 Car. 2. Pritchard's Case.

In this case the party was taken 5 days after the parliament was prorogued, but had it [ 193 ]

been before, it would make no difference as to the discharging him. He was discharged. Raym. 120. S. C. — \* For writs of error and scire facias may be returnable the next parliament. Sid. 245. S. C. by name of LEE v. PRITCHARD, cites 22 E. 3. 3.—2 Hawk. Pl. Cr. 110. cap. 15. l. 73. cites S. C.

4. Commitments by the Peers in Parliament are not made void by the prorogation or dissolution of the same parliament. As in the Lord Stafford's case, who, tho' the parliament which committed him was dissolved, was continued a prisoner, and afterwards tried upon the same impeachment, and convicted and executed. Cited per Cur. Carth. 132. Pasch. 2 W. & M. B. R. in the Earl of Salisbury's case.

And in the Lord DANBY's case, the chief reason for bailing him was, because the then parliament was prorogued,

and the time uncertain for their meeting again, and so no prospect of an opportunity to apply himself that way, and was denied by several Judges of B. R. to be bailed; and when he was bailed, it was to appear at the next Sessions of Parliament, which was an affirmation of the commitment, and a plain proof of the opinion of the Court at that time, that the commitment was not avoided or discharged by the prorogation of the parliament. Per Cur. Carth. 133. Ibid.—And so in the principal case of the EARL of SALISBURY, who was impeach'd by the Commons of high treason, for being reconciled to the Church of Rome, contrary to the statute in that case made, and was thereupon committed to the Tower by the House of Peers, and there continued till the parliament was dissolved, and a new parliament called; and (after a long sessions) adjourn'd for two months, he was remanded to the Tower. Carth. 131. The Earl of Salisbury's Case.

## (E) Breach of Privilege. What amounts to it in Law Proceedings.

1. **FILING** an original is no breach of privilege of parliament. Carth. 137. cites a Case in time of Bridgman Ch. J. between Sir Geo. Binion and Evelin.

2. In Case against the sheriff for a false return of parliament men, the question was upon a writ of error of a judgment in C. B. if this action lay? Holt Ch. J. said, the cause of the suit is a wrong done out of parliament, and whatever falls under the regulation of law, and is done out of the houses of parliament, is subject to the law of the land; for laws are to be executed out of parliament; but as for the rules of the house, as sitting, meeting, &c.

7 Mod. 13. S. C. in C. B. The jury found all the declaration, and also that the right had not been determined

*in the House of Commons, and adjudg'd for the defendant.* Per tot. Cur. But they declared that they did not give their opinions how it would be if the matter

had received a determination in the House of Commons for the plaintiff. *Lutw. 82 to 89. S. C. and the pleadings.*—If a suit be between A. and B. and A. is voted elected, B. cannot bring an action and say that he was duly elected and return'd; because his name does not appear of record, and he is estopp'd to say that A. was not duly elected and return'd; but where the right of election either is determined, or cannot be determined, in parliament, as in the case of a dissolution, an action lies for the false return; for the courts at law can neither anticipate nor contradict their judgment. Per Holt Ch. J. 2 Salk. 503. In Case of Pridaux v. Morris.

And since the statute of 7 and 8 W. 3. an [ 194 ] action lies not, unless it be founded upon the statute, so

that an action on the case lies not, but ought to be an action *tam quam*. 2 Salk. 504. Hill 5 Annæ B. R. Coundell v. John.—In the Case of BERNARDISTON v. SOME. 2 Lev. 114, 116. Mich. 26 Car. 2. it was held by Hale, Twisden and Wild, that action of case lay, it being alleged that the return was made false & malitiose & ea intentione, to put the plaintiff to charge and expence, and so found by the jury, and gave judgment for the plaintiff, Rainsford dubitante: whereupon a writ of error was brought in the Exchequer Chamber, and there the judgment was reversed by six Judges against two, upon the matter in law, that the action did not lie.—S. C. Pollexf. 470. says, that by the ill endeavour of Ld. Ch. J. North in the Exchequer Chamber, the judgment in B. R. was reversed; and see there the argument of Ellis J. for affirming it.—But this judgment of reversal was affirm'd in the House of Lords. *Lutw. 89*—Case for a double return did not lie before the return was determined in parliament. 3 Lev. 29 Mich. 33 Car. 2. C. B. Onslow v. Rapley.—2 Vent. 37. S. C.—S. C. cited *Lutw. 89* in Case of Pridaux v. Morris.

6 Mod. 4c. to 56. S. C. adjudg'd and revers'd accordingly.

4. An action on the Case was brought by a burgess of the town of Ailesbury against the constables of the said town, for refusing to receive his vote which he offered to give at an election of burgesses to serve in parliament for that borough. Upon not guilty a verdict was found for the plaintiff; and after motion in arrest of judgment, three Judges delivered their opinions, that the action did not lie, and Holt Ch. J. held that it did. Gould J. held the action not maintainable, because the Constable acted as a Judge, and not as an officer; and that it was a parliamentary matter; that the hindring the voting was *dominium absque injuria*; that it would beget multiplicity of actions; and that it was out of time; for that it ought to follow and not to precede the adjudication of the House of Commons. Powis J. That the defendant, tho' not properly a Judge, is quasi a Judge; that when this matter comes before the House of Commons the plaintiff's vote will be allowed, and therefore he does not lose his privilege;

privilege; that this injury, if it be one, comes within the rule of *De minimis non curat lex*; that the judgment here will not bind the Commons, nor be evidence there, the Commons not being bound by the determinations here. Powell J. held, that the Constable must either be a Judge or not a Judge, and there is no medium that he is an officer, and as such to execute the King's Writ, and *has only a ministerial power*; but in other matters he agreed with Gould and Powis. Holt Ch. J. contra. That he has a *right to vote*, which being *by reason of his freehold is a real right*, which is not a minimum in lege; that having a *right he must have a remedy*; that if a statute gives a right, common law gives a remedy; that this is an injury, and every injury imports a damage; and that *where parliamentary matters come before the Court, as incident to a cause of action on the property of the subject, which the Court must in duty determine, tho' the incident matter be parliamentary, they are bound by their oaths to determine it*. But the defendant had judgment, which was afterwards reversed in the House of Lords. 1 Salk. 19. Mich. 2 Annæ B. R. Ashby v. White.

5. Several persons were committed to Newgate by the House of Commons for having commenced and prosecuted an action at law against the constables of A. for refusing their votes in the election of members of parliament, which, by the warrant of commitment, was said to be in contempt of the jurisdiction, and open breach of the known privileges of the House of Commons. Upon a habeas corpus brought by them, it was held by three Justices, that the House of Commons were the proper Judges of their own privileges; and that this Court was now estopped to say, that this was not a breach of the privileges of the said House, or that they had no such privilege. But Holt Ch. J. contra, and said, that this was no breach of their privilege; that the commencing and prosecuting an action did not necessarily imply a going further than the bare filing and continuing an original, [ 195 ] which is no breach of privilege; that the suing was no breach, nor can their judgment make it so, nor conclude this Court from determining the contrary. When the House of Commons exceed their legal bounds and authority, *their acts are wrongful*, and cannot be justified more than the acts of private men. There is no question but their authority is from the law, and as it is circumscribed, so it may be exceeded; to say they are judges of their own authority, and no body else, is to make their privileges to be as they would have them. Per Holt Ch. J. 2 Salk. 504. Hill. 3 Annæ. B. R. The Queen v. Paty and al.

### (F) Order of Parliament.

1. *SIR J. P. was attainted of certain trespasss by act of parliament, whereto the Commons were assenting, that if he came out in by such a day, he should forfeit such a sum, and the Lords gave*

*gave longer day, and the bill was redelivered to the Commons again. And per Kirby, clerk of the rolls of parliament, the usage of the parliament is, that if a bill comes first to the Commons, and they pass it, it is usual to indorse it in such form (soit baile as seigniors); and if neither the Lords nor the King alter the bill, then it is usual to deliver it to the clerk of the parliament to be inrolled, without indorsing it; and if it be a common bill, it shall be inrolled; if it be a particular bill, it shall not be inrolled, but put upon the files, and this suffices; but if the party will sue to have it inrolled, it may be inrolled for better security. And if the Lords will alter a bill, in that which may stand with the bill, they may, without remanding it to the Commons: as if the Commons grant poundage for four years, and the Lords grant only for two years, this shall not be sent back to the Commons; quære inde; but if the Commons grant only for two years, and the Lords for four years, there this shall be sent back to the Commons; and in this case the Lords ought to make a schedule of their intent, or indorse the bill in this form, The Lords assent that it shall continue for four years; and when the Commons have the bill again, and will not assent to it, this cannot be an act; but if the Commons will assent, then they indorse their answer upon the margin underneath in the bill in such form, The Commons are assenting to the schedule of the Lords to this bill annexed; and then it shall be delivered to the clerk of the parliament, ut supra. And if a bill be first delivered to the Lords, and the bill passes them, they do not use to make any indorsement, but send it to the Commons, and then if the bill passes the Commons, it is usual to be thus indorsed, The Commons are assenting; and this proves that it has passed the Lords before, and their assent is to pass it from the Lords, and therefore this act (supra) is not good; because it was not sent back to the Commons. Per Fawkes clerk of the parliament, Every bill which passes the parliament shall have relation to the first day of the parliament, tho' it be sent in at the end of the parliament, and it is not usual to make any mention what day the bill is delivered in to the parliament: and the Justices advised; for it came into them by writ, as an act of parliament, therefore quære. And the case was, that the parliament commenced before Whitfontide, and continued after Whitfontide, and the Commons agreed to the bill after Whitfontide, and gave day to Whitfontide next; and the Lords gave day to Whitfontide next except one, and all was one intent; because the bill shall have relation to the first day of parliament, and therefore if it be not prevented, it shall be taken this Whitfontide which is passed at this session; and therefore the Lords did well. Quære. Br. Parliament, pl. 4. cites 33 H. 6. 17.*

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*2. Several burgesses and knights of counties were attainted by the parliament, which act was now to be reversed. And by all the Justices, those knights and burgesses shall not be in the house when this act is to be reversed, but when this act is reversed, they shall come back into parliament. Br. Parliament, pl. 37. cites 1 H. 7. 4.*

(G) *Fees and Wages of Members of Parliament.*

1. **I**N replevin, the defendant justified as *under-sheriff* of L. by fieri facias to *levy the expences of knights of parliament*, amounting, &c. and *every hundred was put in certain*, and W. one of the vills of such a hundred was rated at 10 l. and he, as under sheriff, took the beasts in the vill at such a place, and the same beasts sold and paid the knights, and so avowed &c. And there, per Cur. he may take the beasts of one man for the duty of all the vill; and *those, who find burgesses of parliament, shall not pay to the expences of knights of the county*, and the tenants of the ancient possessions of the Lords of Parliament shall not pay to the expences of knights of the county; but if the Lords purchase de novo, a thing charged to the expences, there the tenants shall pay. Br. Fees, pl. 3. cites 11 H. 4. 2. Br. Avowry, pl. 42. cites S. C. —Br. Distress, pl. 94. cites S. C.

2. As to the fees, wages, or expences of knights and burgesses of parliament, and the manner of levying the same, see the Statutes of 12 R. 2. cap. 4. 23 H. 6. cap. 11 and 35 H. 8. 11.

[For more of Parliament, see Election of Members, &c. Peers, Statutes, and other proper Titles.]

## Parol.

(A) *What Things may be done by Parol, or without Deed.*

1. **T**H<sup>O</sup> dower *ad opus ecclesie* be assigned in another county than where the land is, it is good without deed; but dower *ex assensu patris* is not good without deed. Br. Monstrans, pl. 14. cites 4 E. 3. 43.

2. A man cannot give his emblements growing upon the land without deed. Quere; for this goes to the executor, and therefore is a chattel. Br. Monstrans, pl. 154. cites 25 E. 3. 41. and Fitzh. Feoffments 69.

3. The

\* Br. Mon-  
trans, pl.  
156. S. P.  
So of an  
agreements to

3. Tho' grant of an advowson, or rent in gross, is not good without deed, yet \* *partition* of them is good without deed. Per Thirne & Hill. Br. Grants, pl. 27. cites 11 H. 4. 3.

*present by turn and rent reserv'd upon equality of partition*, cites S. C.—*Partition by parol of two feignories, two advowsons, two villens &c.* and assignment of these in dower, is good without deed. Per Danby. Br. Partition, pl. 3. cites 28 H. 6. 2.

4. Where a man *makes a feme covert or a monk professed his executor, and devises the reversion to be sold by them*, they cannot make a deed, and yet their sale is good without deed, without any attornment. Br. Devise, pl. 12. cites 19 H. 6. 23.

5. And Brook says, the law seems to be *the same of an infant executor as of a feme covert*. Ibid.

[ 197 ]  
So that  
which must  
pass by grant  
by deed can-  
not be surrendered  
without deed ;

6. *Where a thing cannot commence without deed ; as a grant of rent-charge &c. it cannot pass from the grantee to another but by deed ;* per Markham. Br. Grants, pl. 38. cites 19 H. 6. 33.

*quod nota ; but if land be leased by deed, it may be surrendered without deed ;* per Markham. Br. Grants, pl. 38. cites 19 H. 6. 23.

7. A man cannot *lease his warren for years* without deed, nor grant the *next presentation* of his church but by deed. But per Choke J. a parson may *lease his tithes* without deed. Br. Montrans, pl. 71. cites 9 E. 4. 47.

S. P. But  
the sheriff  
may make  
his precept  
to the bai-  
liff by parol

8. *Plaint in replevin* shall be in writing and not by parol ; for per Littleton a man shall not be put to *answer* unless the matter be in writing. Br. Plaint, pl. 5. cites 9 E. 4. 48.

to make deliverance as well as by writing. Br. Replevin, pl. 28. cites S. C.

9. *Justices of Bank upon presence of any in the hall* may send their servant to arrest them without writing, *contra in their absence ;* for there it ought to be by warrant in writing. Br. Peace, pl. 7. cites 14 H. 7. 8.

Br. Court  
Baron, pl.  
25. cites  
S. C. per Cur.

10. A *precept in the Court Baron* is good by parol. Br. Trespas, pl. 439. cites 16 H. 7. 14.

11. Note that a *discharge by parol given by the plaintiff to the sheriff, who has a prisoner in his ward upon condemnation of debt,* is sufficient. Br. Barre, pl. 3. cites 27 H. 8. 24.

12. *Command to receive rent* in order to a re-entry on nonpayment may be by parol. Cro. E. 22. Mich. 25 Eliz. C. B. Sir John Zouch's Case.

13. *Livery by parol on a sale on condition without deed* was held good. Cro. E. 25. Pasch. 26 Eliz. B. R. Gilbon v. Cordel.

14. Where a parol is *reduc'd into a deed*, the parol agreement is at an end, and all is resolv'd into the deed, so that an assumpsit will not lie now. Sti. 19. Pasch. 23 Car. Curtis v. Columbine.

But a sheriff  
cannot com-  
mand his bailiff

15. An *under sheriff* may be made by parol. Jenk. 69. in pl. 31. *to arrest* without a warrant in writing. Vid. Vent. 46. Mich. 21 Car. 2. Anna.

But any Justice of Peace may lawfully by word of mouth authorize any one to arrest another who shall be guilty of an actual breach of the peace in his presence, or shall be engaged in a riot in his absence. Vid. Hawk. Pl. C. 160. cap. 65. f. 16. and 2 Hawk. Pl. C. 83. cap. 13. f. 14.

16. A parol submission to an award does not imply a promise to perform it. Lev. 113. Mich. 15 Car. 2. B. R. Tilford v. French. Sid. 166. S. C.

17. Lease by prebendary or churchman of the possessions of his prebend is not good without deed, by 13 Eliz. 10. Vaugh. 197. Hill. 19 & 20 Car. 2. C. B. in Case of Holden v. Smallbrook.

18. Licence to take a profit in aliena solo, as to put sheep into a common, in which the licensor has common for a like number, may be by parol, if it be to take the profit *unica vice*; for no estate passes by it. Vent. 18. 25. Pasch. 21 Car. 2. Rumsey v. Rawson. S. P. Vent. 124. Hoskins v. Robbins. Sed adjournatur.—So licence is

chafe in a warren is good without deed; per tot, Cur. Br. Monfrans, pl. 59. cites 22 H. 6. 52.

19. A parol declaration of one's intent is not good against a declaration in writing. 2 Ch. R. 78. 24 Car. 2. Lewis v. Lewis. Yet where a declaration was fully prov'd, and

made before the deed was drawn, and it appeared plainly to be the design of the executing the deed, it may be good, per Reynolds Ch. B. Gibb 213. who cited it as the Case of Harvey v. Harvey.—2 Ch. Cases 180. S. C. Mich. 2 Jac. 2. which was a trust by parol to avoid a sequestration in the rebellion of 1641.

20. 29 Car. 2. 3. f. 1. enacts, That all leases, estates, interests of freehold or terms of years, or any uncertain interests in or out of lands, tenements and hereditaments not put in writing, and signed by the parties making them, or their agents authorized by writing, shall have no greater effect than as estates at will. [ 198 ] For the cases on the several points in this statute, vid. the proper heads and subdivisions.

§. 2. Except leases not exceeding 3 years, whereof the rent shall be two thirds of the full value.

§. 3. No such estates or interests, not being copyhold or customary interest, shall be assigned, granted or surrendered, unless by deed or note in writing signed (ut sup.) or by operation of law.

§. 4. No action shall be brought after the 24th of June, to charge an executor on a special promise to answer damages out of his own estate,

Or to charge the defendant upon any promise to answer for the debt or miscarriage of another,

Or upon an agreement or consideration of marriage,

Or on any contract of sale of lands, tenements or hereditaments, or any interest concerning them,

Or on any agreement not to be performed within a year after the making,

Unless such agreement or some note thereof be in writing, and signed by the party to be charged, or some other by him authorized.

§. 5. All devises of lands or tenements shall be in writing, and signed by the party devising, or some other in his presence and by his

*direction, and subscribed in his presence by three or four witnesses, or else shall be void.*

S. 6. *No such devises in writing shall be revocable, otherwise than by writing or burning, tearing or cancelling the same by the testator, or in his presence and by his consent.*

S. 7. *All declarations or creations of trusts shall be made by some writing, signed by the party, or by his last will in writing, or else shall be void.*

S. 8. *Trusts resulting by implication of law, or transferred or extinguished by act of law, shall be as if this statute had not been made.*

S. 9. *Assignments of trusts shall be in writing, signed by the party granting or assigning by such last will, or else shall be of none effect.*

S. 17. *No contract for the sale of any goods for 10l. or upwards shall be good, except the buyer actually receive part of them, or give something in earnest, or some note thereof in writing be made and signed by the parties to be charged or their agents.*

S. 22. *No will in writing of any personal estate shall be repealed by words only, except the same be in the life of the testator committed to writing and read to him and allowed by him, and that be proved by three witnesses.*

21. An *use* will not pass by parol without deed; but the Ld. Ch. J. Pemberton said, it would be a *good trust* or *chancery use*, if for money, 2 Show. 158. Pasch. 33 Car. 2. B. R. in Case of Berris v. Bowyer.

22. A *parol release* is good to discharge a debt by simple contract. Arg. 2 Show. 417. Mich. 36 Car. 2. B. R. in Case of Howson v. Denham.

23. A *promise merely executory* on both parts; as if I promise B. 5s. if he goes to Pauls, before B. goes, I may *discharge* him, and so shall discharge myself of payment of the 5s. for no debt was yet due, nor any thing executed on either side. 3 Lev. 238. Mich. 1 Jac. 2. C. B. Mayor &c. of Scarborough v. Butler.

Any promise may be discharged by parol, but not after it is broken; for then it is a debt. Mod. 206. Trin. 27 Car. 2. C. B. Milward v. Ingram.—2 Mod. 43. S. C.—259. Edwards v. Weekes. S. P.—\* Goldb. 8. contra, Taylor v. Fulham.

24. An agreement in writing since the statute of frauds and perjuries may be *discharged* by parol. Vern. 240. Pasch. 1684. Goman v. Salisbury.

25. A *rent* assigned in lieu of dower may be by parol without deed, tho' it be a freehold created *de novo*; and tho' a rent lies in grant, because this is not properly a grant but an appointment. 12 Mod. 201. Trin. 10 W. 3. Saunders v. Owen.

26. *Lease for years surrendered* to the lessor by parol *reserving a rent*; adjudged this was a good reservation upon the contract, and that an action of debt would lie for the rent after the first day of payment incurr'd, tho' the reservation was by way of contract and without any deed. 3 Salk. 312. pl. 7.

27. If one has a *bill of exchange*, he may *authorize another to indorse his name* upon it by parol, and when that is done, it is all one as if he had done it himself; per Holt Ch. J. at Nifi Prius. 12 Mod. 564. Mich. 1701. Anon.

28. An *insurance* was made from Archangel to the Downs, and from the Downs to Leghorn, but there was a parol agreement at the same time, *that the policy should not commence till the ship came to such a place*, and it was held that the parol agreement should avoid (or defeat) the writing; cited per Holt Ch. J. as adjudged in Pemberton's time. 2 Salk. 444, 445. December 3, 1703. Bates v. Grabham.

29. If a thing is *granted* by a writing, which is grantable by parol, it may be *revoked* by parol. Vid. 10 Mod. 74. Hill. 10 Ann. B. R. in Case of the Queen v. Sutton.

30. *Deputation of an office* is in its own nature grantable by parol, and therefore tho' it should happen to be granted by writing, yet since it is in itself grantable by parol, it may be revoked by parol. 10 Mod. 74. Hill. 10 Ann. B. R. in Case of the Queen v. Sutton.

31. A *presentation*, being but a commendation of a clerk to the ordinary, or a declaration of the King's will, and not any interest, and nothing granted or given by it, may be made as well by the word of the patron only (unless a *corporation aggregate* be patron, for they must present under their common seal) as by an instrument in writing. Watf. Comp. Inc. fol. 151. cites as in the margin \*.

\* 19 E. 3.  
Quare Imp.  
60. 38 E. 3.  
3. Trin. 8  
Jac. King v.  
.... 2 Cro.  
248. Co.  
Litt. 120.  
Dubitat.  
Mich. 1649,

Canes v. Osby. Stil. 136, 13 H. 8. 12. Br. Corporation. 81.

32. An *officer* being the serjeant at arms to attend the Ld. Chancellor *was excused the exercise* of it by the Queen by parol. See Officers &c. (H) pl. 1. and the notes there.

33. A *filicer* was *discharged of his office* by parol. See Officers &c. (W) pl. 1. and the notes there.

34. Whatever is to take effect *out of a power* or authority, or by way of *appointment* is good without deed. 2 Salk. 467. Trin. 10 W. 3. B. R. Saunders v. Owen.

Otherwise  
where it  
takes effect  
out of an in-  
terest, and  
2 Salk. 467.

is to enure as a grant; for then if it be of a thing *incorporeal*, it must be by deed. Saunders v. Owen.

[For more of Parol in general, see Agreement, Grants, Partition, Surrender, and other proper Titles.]

## Parols [alias, Words.]

(A) \* *Ancient [Words.]*

\* For this,  
see the Glos-  
saries and  
Dictionaries.

- [ 200 ] [ 1. 3 E. 1. ROT. chartarum membrana. 2 William the second granted &c. cum omnibus libertatibus & consuetudinibus quæ Anglici vocant *Sac & Sac &c.* ]
- [ 2. 19 E. 1. Rot. chartarum generally through all the charter rolls, there is mention of ancient franchises, quod vide throughout at large, *infangthesfe &c. toll, saccham and socham &c.* ]
- [ 3. 6 E. 1. Rot. patentium M. 27. a man has liberty of *infangthesfe* in all his lands in the county of Kent. ]
- \* See pl. 15. [ 4. 18 E. 1. Liber parliamentorum is there pleaded a grant of R. 1. of two villis, habendum cum *sacha, socba, toll, and \* them infangthesfe &c.* ]
- [ 5. Nomen Anglicanum vocatum, *flemeneffre* or *flemeneffrethe* is expounded and interpreted catalla fugitivorum. M. 10. H. 4. Rot. 12. B. R. and there cites the Red Book of the Exchequer accordingly. ]
- [ 6. Trin. 7 E. 3. B. R. Rot. 28. In a quo warranto in placitando dictum est quod per *flem. & fleth.* is understood annus & pastum & medium tempus quia *flem.* Anglice fugitivus & convictus interpretatur *fleth.* Anglice solum vel terra dicitur, ita videlicet quod quicquid per feloniam in bonis vel in terris hujusmodi felonum accrescere (debet) domino regi extra libertatem ipsius abbatis in corpore comitatus spectare debet ad ipsum abbatem infra dominum suum. ]
- [ 7. By the word *flemaflare* is understood chattels of the tenants of the grantee who is attainted of felony. Time E. 3. Kel. 145. b. ]
- [ 8. *Drengagium* est certum servitium, & non servitium militare. P. 6. E. 1. B. R. Rot. 7. ]
- \* Putna in Chacea de Bowland, i. e. confuetudo clamata per forestarios & aliquando per balivos hundredorum, recipere victualia, tam pro seipso hominibus, equis & canibus, de tenentibus & inhabitantibus infra perambulationem forestæ seu hundredi, quando eo pervenerint nihil inde solvend. 4 Inst. 307.
- [ 9. Hil. 5 E. 3. B. R. Rot. 48. Inquisitio capta de consuetudine vocata, \* *Putna* q in chacea regis in comitatu Eborum. ]
- [ 10. Hill. 5 E. 3. B. R. Rot. 24. *Tronagium* debet dari de lanis & *pesagium* de mercibus, and not tronagium de mercibus. Adjudged. ]
- [ 11. Hill. 4 E. 1. B. Rot. 29. Secundum legem & consuetudinem regni nullus jurare debet in assisa post *clausum alleluia.* ]
- [ 12.

[12. 42 H. 3. In Grafton's Chronicle, fo. 134. Sir Hugh Spencer held his Court and Pleas in London without order of law, and there punished bakers for default of assise by the tombrell, where before they were punished by the pillory; and note, that there in the margin it is said, that the tombrell was a kind of pillory made four square that turned round about.]

[13. By the word \* *like* is intended, that it was at a court of the tenants of the grantee. Time of E. 3. Kel. 145.] \* This is misprinted, there being no such word in Kelway, but should be (foke.)

[14. By the word *fake* is intended amercement of the tenants of the grantee of it in his court. Time of E. 3. Kel. 145.]

[15. By the word \* *them* is intended the engendring of the grantee. Time of E. 3. Kel. 145.] \* Mancipiorum sobolem Somn. gloss. theam.

[16. By the word of *grant of murther* is intended all amercements \* of the tenants seigniors of the grantee amerced within his seignories, by reason of murther, (that is to say) for every murther 100s. to be given, which is in nature of an amercement. Time of E. 3. Kel. 145.]

\* Fol. 245.

[17. By the word of *grant of forestal* is intended to have the amercements of forestallers, (scilicet) to amerce them. Time of E. 3. Kell. 145.]

[18. By the word *butlagh* is intended, if any felon be taken within the seignory of the grantee, and delivered to the vills to carry to the prison of *Dourgh* and escapes, to have the escape in the same manner as the King for escapes found before the Justices in eyre. Time of E. 3. Kell. 145. b.] [ 201 ]

## (B) Abbreviations.

[1. ] F a *venire facias* be awarded de \* *visu parochie de D.* without any dash, yet it is good; for it shall be so taken, this being the usual abbreviation for *viseneto*, though the dash is wanting. Mich. 9 Car. B. R. between *Pennington* and *Morgan*, adjudg'd in writ of error upon a judgment in Bank.] \* So it is in the original, but it seems it should be thus, viz. (visu.)

2. *Ille numerus & sensus abbreviationum accipiendus est, ut concessio non sit inanis.* 9 Rep. 48. Trin. 7 Jac. in the Earl of Salop's Case.

3. *Franciscus* in the *venire facias* and *Francus* in the *distringas* are well enough, being both but one name abbreviated. Cro. J. 534. Moor v. Blackwell.

4. 6 Geo. 2. cap. 14. allows such abbreviations as are used in the English language to be made in all writs &c. pleadings, rules, orders, indictments, and informations &c. notwithstanding 4 Geo. 2. cap. 26.

that by the statute of 6 Geo. 2. to explain the stat. of 4 Geo. 2. for putting all proceedings, pleadings &c. into the English tongue, abbreviations in an attorney's bill, such as [fo.] for folio, [Mr.] for master, [pd.] for paid &c. are helped after a verdict. Barner's Notes in C. B. 92. Ray v. Jackson.

Upon a motion in arrest of judgment, the Court was of opinion,

See Grants,  
(H. 13.)

(C) *Exposition.*

\* See pl. 8.  
and the notes  
there.

[1.] IF a condition of an obligation be to stand to the award, *ita quod it be made, and* \* *to be delivered to the parties at or before such a day*, by those words it is intended that it shall be delivered to the parties, otherwise they are not bound to performance; and it is not sufficient to allege, that the arbitrator made it, and was ready to deliver it to the parties, in as much as the words imply, that it shall be delivered to the parties. *Dubitatur. Mich. 9 Car. B. R. between Wigget and Butterie. The Court divided upon a demurrer. Intratur. Hill. 7 Car. Rot. 840.*]

\* Orig. [de-  
liver.]

† Orig.  
[deliver.]

[2.] In Action upon the Case, if the plaintiff declares, that the defendant promised to pay so much &c. in consideration that the plaintiff should *so drain certain drowned land, that it should be dry in extremitate hiemis, viz. in aliquo tempore between All Saints and Candlemas*; and alleges, that he after drained it in Candlemas eve, by which it was dry in extremitate hiemis, between the two feasts, this is not good; for the words *aliquo tempore* are to be taken according to the subject matter, either for some time or for all the time, and here by the subject matter it appears, that it should be dry through all the extremity \* of winter between the said feasts, and not by one day in † the winter. *Mich. 9 Car. B. R. between Chapman and Bell, per Jones and Berkley against Richardson and Croke, this being moved in arrest. But herein Richardson and Croke rely'd much upon the verdict, that it had made the declaration good, being whether it was drained according to the promise, and found for the plaintiff that it was.*]

[ 202 ]

[3.] In action upon the Case, if plaintiff declares that B. was arrested at his suit in a court, and upon this the defendant, in consideration that the plaintiff would at the request of the defendant *forbear ulterius prosequi* the said B. the defendant, assumed, that B. should give security to the plaintiff for the debt before the next court, or that he himself would pay the debt, and avers, that he ulterius prosequi the said B. abstinuit, & adhuc abstinuit, & abinde huc usque aliqualiter abstinuit & desistit. This is a good averment of the performance of the consideration; for the word *aliqualiter* in this sense and context of the words is, that he abtained utterly; as Littleton says, if a man grants an annuity *ita quod it shall not charge his person aliqualiter, hoc est, in any sort. H. 11. Car. B. R. between \* Brent and Whitwick. Adjudged per Curiam in writ of error upon such judgment in Coventry, and the judgment affirmed accordingly. Intratur. P. 11. Car. Rot. 270.*]

\* Fol. 147.

Cro. C. 186.  
S. C. but  
where the  
words are

[4.] If a lease be made *habendum a concessione pro termino octoginta & tredecim annorum*, this is a lease for the term of 93 years, and not for 80 and 30 years; but it shall be interpreted to be octoginta

octoginta & tredecim annis, that is to say, 93 years; for the intention of the parties appears to be so. Mich. 10 Car. B. R. between Hoopwell and Serle. Adjudged per totam Curiam upon a special verdict found in Devon. Intratur. Hill. 9 Car. Rot. \* 869.]

octoginta & tredecim &c. and all the Court held that it should be taken according to the common

parlance for 13 years; and that *tredecim* and *tresdecim* is all one, and is so wrote, *exponia gratia*, and it being one intire word cannot be taken otherwise; but if written as several words, it should be otherwise. Hopehill v. Searle. — \* Cro. C. 380. cites Rot. 269.

[5. If an action of account be brought *de septem ponderibus, and decem uncis cere*, and judgment for the whole, this is erroneous, for ponderibus is weights, and not pounds; for *pondus pondi* is a pound, and *pondus ponderis* is a weight, and therefore as it is, it is insensible. P. 11. Car. B. R. between Richards and Hance. Adjudged per Curiam, and the judgment given in Exeter reversed accordingly. Intratur. Trin. 10 Car. Rot. 720.]

[6. If a man devise land to B. his wife for life, the remainder to C. in fee, and after in a codicil these words follow, *Item my will is, that the said B. shall have power six months before her death to make a lease thereof, the term to be for six years*. B. may make a lease for 6 years at any time before her death, though it be not 6 months before her death, but one month, or a week, or a day, for the time of her life cannot be known, and therefore the intent was, that she should have power at any time within 6 months of her death, to lease it for six years. P. 13 Car. B. R. between Harris and Grahame adjudged per Curiam upon a special verdict, for a mesuage in London. Intratur. Mich. 11 Car. Rot. 370.]

[7. If condition of an obligation be, *Whereas such ship is outward bound in a voyage to St. Luca's in Spain, and from thence to return directly to the port of Dover or London, or any of them, within the realm of England, if the obligor do pay to the obligee 10l. within 20 days after the first or next return or arrival, after the date of of this obligation, of the said ship in the port of Dover or London aforesaid, or either of them, or in any other part or place within the realm of England, or elsewhere, where she shall make her right discharge from the said voyage without fraud*, then the obligation to be void &c. If the ship makes voyage, and makes her return to any place out of the realm, as at Venice, and there makes her discharge, the obligor is bound to pay the money, though in the beginning of the condition, it is recited that he should make his return to the port of Dover or London in England, yet in as much as the words are after in the body of the condition more large, viz. or elsewhere, though it is said (*from the said voyage,*) yet it shall be taken, that the intent was more large than the first words. Hill. 14 Car. B. R. between Harris and Gravenor. Adjudged upon a demurrer. P. 14 Car. Rot. 393.]

[8. If the condition of an obligation made upon a marriage be, that if A. the obligor at the request of B. who should be his wife, give licence to B, with his assent, to declare her last will, by

† To be paid is all one with, and to pay; otherwise it is an idle thing to ermit her to make a will, if he doth not pay; and

• Fol. 248,

therefore they all held the plea ill, and adjudg'd for the plaintiff. Cro. C. 597. S. C. Hob. 253.

which she may devise to whom she please 100l. the same † to be paid out of the personal estate of the said A. within one year after the death of B. bona fide, then the obligation to be void; upon this condition it shall be interpreted and taken, that A. not only shall give leave to B. to make her will of 100l. but also that if she gives it by the will, that he will pay it; for it appears to be the intent of the condition, and it is all one as if he said, and \* he shall pay the same &c. for it is said, *the same to be paid out of his personal estate bona fide*, which shews, that it ought to be paid by him bona fide, and within a year after the death of B. Mich. 16 Car. B. R. between *Sherman and Lilly*. Adjudged upon a demurrer per totam Curiam, præter Jones, who thought that the words should be interpreted, that she shall have power to make a will, and of 100l. to be paid out of his personal estate within a year after the death of B. and that A. is not bound to pay it by the obligation, but the legatee shall have only remedy for it in the Spiritual Court. Intratur. H. 15. Car. Rot. 1198.]

[9. The words of a *diem clausit extremum* to the escheator are, Quod per sacramentum proborum hominum diligenter inquireret & inquisitionem inde factam nobis &c. sub sigillo tuo & sigillis eorum per quos facta fuerit sine dilatione mittas; and in the conclusion of the office it is thus, In cujus rei testimonium *figilla sua alternatim apposuerunt*; tho' properly *alternatim* imports interchangeably, and then it cannot be supposed that escheator and jurors sealed to one part, but the escheator to the one, and the jurors to the other part, yet it is good; for it may be true that all sealed, and then the addition of the word *alternatim* ought not so strictly to be construed but that it may be taken, that they all sealed both parts, the which shall not hurt; for the words are in the conclusion, that as well the escheator as the jurors *figilla sua alternatim apposuerunt*, which implies, that they should put their seals to both. Hobart's Reports. Case 336. *Waddington's Case* resolved.]

Sty. 132.  
6. C. Molloy 259.—  
S. C. cited Arg. Show. 322. in Case of *Jeffries v. Legendra*. — Comb. 56. Trin. 3 Jac. 2. B. R. S. P. but no judgment. *Burton v. Wolford*.

[10. If by a charter party the owners of the ship hire the ship for a certain voyage to the merchants &c. and the merchants covenant on their part to cause the ship to return into the river Thames within a certain time (*periculis & casualitatibus marium, Anglice, dangers of the seas, exceptis.*) And after, in the voyage, and within the said time of the return, the ship was taken upon the sea per homines bellicosos modo guerrino arraiatos to the merchants unknown, against the will of the merchants, their factors and assigns, & ab inde huc usque per eos detenta fuit, per quod they could not return it within the river Thames within the time mentioned in the covenant. This is an impediment within the exception; for those words intend as well any danger upon the sea by *pirates and men of war*, as dangers of the sea by *shipwreck, tempest*, or such like; and so is the common acceptance of the words among merchants upon charter parties. Mich. 24 Car. B. R. between *Pickering and Barkley*, adjudged upon a demurrer, in which divers merchants were heard in Court for the interpretation of the words, and the practice

practice of the merchants in the Court of the policy of assurance and otherwise, who all agree that it extends in their contracts and bargains by their common acceptance to such dangers upon the sea by pirates and men of war. Intratur. Pasch. 24 Car. Rot. 154.]

11. Where the words are *dubious* they ought to be taken in such sense *that no wrong be done*; and the law more regards a less estate by right, than a greater estate by wrong. 2 Lev. 155. Arg. Hill. 27 & 28 Car. 2. B. R. in Case of Piggot v. the E. of Salisbury. [ 204 ]

12. *Common usage* and reputation shall *direct* the intendment of the parties, as in giving or selling a barrel of beer, the barrel is not given or sold, but the beer only; but otherwise of a hoghead of wine. Savil. 124. Mich. 32 & 33 Eliz. in Case of Matthew v. Harecourt.

13. *Verba de futuro*, or in future, shall be taken *futurely* when they refer to a future act, otherwise when they refer to a present resolution. Cro. E. 306. Mich. 35 & 36 Eliz. B. R. Burton v. Gowell als. Gamell.

14. *Verba equivoca & in dubio posita intelliguntur in digniori & potentiori sensu*. 6 Rep. 20. Hill. 38 Eliz. B. R. in Gregory's Case.

15. A. grants a rent-charge to B. to issue out of the manor of N. and out of all his lands in D. and E. in the county of K. belonging or appertaining to the said manor. 'This shall be taken to extend to the land occupied in the manor, tho' it is not parcel of it; per three Justices against Popham. Brownl. 184. Mich. 3 Jac. Crate v. Moor.

16. *Grammatical* construction of a word was *wav'd*, and the word adjudged to signify in law according to the common received sense of the word. Lane 11. Arg. Mich. 3 Jac. in Case of Brett v. Johnson.

17. For the interpretation of words there are *two grounds*. 1st. If the *second part contradicts the first*, the second part shall be void. 2d. If the *second part expounds the first*, both shall stand; per Doderidge. Arg. Roll. R. 376. Pasch. 14 Jac. B. R. in Case of Berry v. Perry.

18. When a deed is doubtful in construction, the meaning must be gathered from all the parts of it; but yet that is tyed with two cautions, that it be not against any thing expressed by the said indenture, but only in case where it is *doubtful*. Winch. 92. Arg. Trin. 22 Jac. C. B.

19. Words of *relation* will never controll that which was certainly put down before; per Winch. Winch. 93. in Case of Trenchard v. Hoskins.

20. A. has three daughters B. C. and D.—A. promised R. to give him, in marriage with D. as much as he gave in marriage with any other of his daughters. A. gave with B. to one H. 100*l.* and a bond of 100*£.* to pay the said H. 50*l.* more at three months end after his decease, if the said B. or any issue of her body was then living. Some held that the promise extended only to money presently

presently given, and not to the bond, others e contra; but all agreed if it extend to the *bond*, it ought to have been averred, that D. or some of the issue of her body were alive, and not that B. and the issue of her body were alive. Cro. Car. 186. Pasch. 6 Car. B. R. Cule v. the Executors of Thorne.

21. The words *modo & dummodo*, tho' generally taken conditionally, yet have been always before construed as an admonition or *caution* in granting of licences to hold a second benefice &c. and there to avoid a multitude of inconveniencies from a different construction, adjudged that it shall not now be construed as a condition, but as it had been usually. Cro. C. 475. Trin. 13 Car. B. R. Dodson v. Lynne.

1 Lev. 294.

HANGAN  
v. CARN.

S. C. Hob. 275. CLANRICKARD'S CASE.—2 Vern. 325. S. P. Richards v. Lady Bergavenny.

22. *Clauses in company* are to expound one another. Vent. 91. Trin. 22 Car. 2. B. R. Lion v. Carew.

23. Words tho' never so *joint* shall be taken severally where they have a distinct subject matter to work upon; per Holt Ch. J. Arg. 3 Ch. R. 126. Orby v. Ld Mohun.

24. *Several words* are void where they would work on a *joint interest*, and joint words are void where they would work on a *several interest*; per Holt Ch. J. Arg. 3 Ch. R. 128. cites 5 Rep. 18. Slingsby's Case.

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25. The words (*heirs of the body*) cannot in the *same clause* be construed words of limitation as to lands, and of designation of the person as to goods. 2 Vern. 325. Mich. 1695, Richards v. Lady Bergavenny.

26. Where a matter is *capable of different meanings*, that shall be taken which will support the declaration or agreement, and not the other which would defeat it. 1 Salk. 325. Trin. 2 Annæ, B. R. Wyatt v. Aland.

See Condi-  
tions.—  
Covenants.

(D) *Copulative and Disjunctive*; where they are one Sentence, and where several.

Godb. 445.  
S. C. but not  
exactly S. P.

\* Fol. 249.

[ 1. ] IF A. covenants with B. upon reasonable request to him made by B. to surrender certain land, and all his interest in it to B. and also to permit and suffer B. to take the profits of the land &c. in this case the *request* does not go to the taking of the profits, but only to the surrender; so that he is bound to suffer him to take the profits without request, tho' \* there is but one verb which goes to the whole: but if he had been to surrender upon request, and also to permit him to take the profits, there it had been more clear. P. 7. Car. in the Exchequer Chamber between *Simms* and *Smith*, per Curiam, upon writ of error upon judgment in B. R. seems e contra: but afterwards (to wit) Trin. 7 Car. or Mich. 7 Car. per Curiam resolved and adjudged, that the request was not necessary as to the taking of the profits, and the judgment

ment given in B. R. accordingly upon a demurrer now affirm'd per Curiam.]

[2. If a lease for years be made to A. *determinable upon the lives of B. C. and D.* and after B. dies, and then A. assigns to E. and after E. by indenture reciting the said lease, and the death of B. and the assignment to him by this indenture, now assigns the term to F. and covenants with him, that he himself is lawfully possessed of all the premisses of a good and sufficient estate, for the residue of the said term then to come, *if the said C. and D. or either of them shall happen so long to live, and they the said C. and D. are yet in full life*; tho' the words are not and (that) the said C. and D. are yet in full life, yet it is implied by the words, and it ought to be a several covenant, or otherwise this last part will be void and to no effect. Trin. 11 Car. B. R. between *Basket* and *Scott*, adjudged upon a demurrer, in which the breach was assign'd, because C. *was dead at the time of the assignment* made to him, and the word (that) was added to the other words in the declaration, and the defendant demanded oyer of the indenture which was entered in hæc verba in which the said word (that) was not; yet because it *was no more than the law implied*, it was adjudged good. Intratur P. 11 Car. B. R. Rot. 221.

3. If A. upon a marriage intended by C. his son with B. covenants with D. to stand seised, and to make other conveyance of certain land to the use of C. for life, and after to B. for her jointure for life, and after two other uses to their issue &c. and of other land to the use of himself for life, and after to C. for life, and after to the issues &c. as before. And then A. covenants modo & forma sequentibus, videlicet, Prædictus A. pro & non obstante aliquo actu sive re per ipsum facto in contrarium tempore sigillationis & deliberationis indenture prædictæ stabat & fuit legitime seiscitus ac usque tales bonæ & sufficientes convenientiæ & assurançia in lege forent factæ & legitime executæ ut supradictum est steteret & esset seiscitus de præmissis sibi & heredibus suis in feodo simplici absque aliquo genere, Angliæ, manner, condition, defeasance, mortgage, limitation, sive potestatis revocationis mutare [vel] permutare eadem; ac insuper quod dicta terra & præmissa, præantea limitata pro junctura dictæ B. a tempore decessus prædicti A. pro & durante termino vite dictæ B. continuarent, remanerent & forent eidem B. & assignatis suis pleni & clari annui valoris 200 l. ultra & præter omnia onera solutiones exitus & reprisas quæcunque. In this case, tho' this bears a semblance of being a covenant, because the words of covenant are but once named; and tho' it is said at the beginning, that he covenants in manner following, and tho' the word *et* couples all together, yet the last part touching the value is an absolute several distinct covenant of itself, so that if the land limited for the jointure be not of the value of 200 l. a year, tho' it is not by any act of himself, yet he has forfeited his covenant, because it is usual in case of jointure to covenant for the value, and so *subjeçta materia* explains it. Also it appears throughout the deed to be the intent of the parties; for it is not usual to covenant that the value is such notwithstanding any act done by himself;

Cro. Car. 495. S. C. — Jo. 403. S. C. and says it was the Case of one *Jones*. — Litt. Rep. 135. marg. of Case of *Trenchard v. Hoskins*, cites S. C. which the [ 206 ] reporter says he argued.

himself; for then it would be of no effect. P. 14 Car. B. R. between *Hughes* and *Bennet*, adjudged upon a demurrer. Intratur Trin. 13 Car. Rot. 1536.]

Fol. 250.

Winch. Rep.  
91. S. C.  
Trin. 22

Jac. in C. B.  
there it was  
held by Ho-  
bert Ch. J.  
and Jones J.  
that this is  
all one co-  
venant, but  
Hutton and

Winch. J. held that they were several.—S. C. argued by counsel. Litt. Rep. 62. 65. 135. and Mich. 4 Car. by the Court of C. B. Ibid. 201. when the whole Court, viz. Yelverton, Harvey and Hutton J. and Richardson Ch. J. held that all was one absolute covenant.—S. C. cited Sid. 323. in *Cafe of Gainsford v. Griffith*; and 'tis there said that true it is that the same was so adjudged in C. B. but that a writ of error was afterwards brought in B. R. where it was held by Jones, and all the other Justices except Whitlock, that the judgment be reversed; but it was said that no reversal was enter'd; and therefore the Reporter adds a quere.

Covenant that he was seised in fee, notwithstanding any act done, and that the lands were of the annual value of 100l. in this case the words (*notwithstanding &c.*) cannot be applied to the covenant concerning the value, because they were plac'd in the middle of the sentence. Saund. 60. in *Cafe of Gainstorth v. Griffith*, cites Cro. Car. 106. *Crayford v. Crayford*, and 495. *Hughes v. Bennet*.

[5. In an indenture between A. and B. it is recited, that where B. by other indenture dated &c. had assigned to C. a messuage &c. Now this indenture witnesseth, that B. covenants that he or D. his brother will deliver to the said C. or in his absence to E. at his shop, a terror of the premises; and of the truth thereof, ad optima eorum peritiam, upon request made to them by the said C. would take their oath before a Master in Chancery; and also would deliver to one W. safely to be kept to the use of the said B. and C. the original demise whereof he then had a copy, the which demise should be shewn, with the assent of both parties, or as necessity should require &c. Tho' in this case they are not bound to make an oath of the truth of a terror without request made, yet he is bound to deliver the original demise without request; for the request does not refer to this, but to the first, as appears by the coherence, and putting the request among the covenants, and not in the beginning or end. P. 15 Car. B. R. between *Smith* and *Garbutt*, adjudged per Curiam, upon a demurrer, where it was pleaded that there was [ 207 ] not any request made, and the breach assign'd for not delivery of the original demise. Intratur Hill. 14 Car. Rot. 1052.]

\* Condition that husband and wife, being lessors for life of land, should levy a fine to a stranger at the costs of the stranger; and also that they should levy a fine of

[ 207 ]

either lands,

which they

also had for their lives, to a stranger, and at their charge.

Obligor pleads that husband and wife

offer'd to levy the fine, if the stranger to whom the fine was to be levied would bear the charges.

Obligee demurr'd; and adjudged for the plaintiff, because the levying the second fine has no reference to the first; for they are two distinct sentences, and the words (and also) make them so.

Brownl. 94. Pasch. 5 Jac. *Hollingsworth v. Huntley*.

And where in such case it was

[6. If A. be bound to B. by obligation, whereof the condition is, that where they have submitted themselves to the award of

J. S.

J. S. that if A. stands to and performs the award of J. S. ita quod the award be under the hand and seal of the arbitrator, and delivered to either of the said parties before such a day, then the obligation shall be void. In debt upon this obligation, if defendant pleads no award made, and plaintiff shews the award, and shews that the award was delivered to the plaintiff, but does not allege that the award was delivered to the defendant, it is not good, because here the words (to either of the said parties, in Latin *utrique partium*) ought to be interpreted to both parties. Trin. 16 Car. B. between Holwell and Worledge, adjudged upon demurrer. Intratur Trin. 16 Car. R.

Roger Ward attorney for Holwell.]

pleaded that the award was delivered to the plaintiff, and to one of the defendants, but not to the other: the Court upon demurrer gave judgment against the plaintiff, and held

that the word (utroque) is sometimes to be taken *discretive*; as where two or three are bound in a bond, *et utrumque eorum*; which makes the obligation several: and sometimes *collective*, as in the present case; and this depends upon the subject-matter, so that a reasonable construction be made, *et ut evitetur absurdum*. Now in this case, as each of the parties is subject to the penalty and danger, it is reasonable that the award should be delivered to each, in order that they may be able to perform it. It was likewise held, that there being two of one party, the delivery to one of them in this case was not sufficient; for party is to be intended of an *intire* party, and one is as much within the penalty and danger as the other. 5 Rep. 103. Trin. 43 Eliz. B. R. Hungate's Case.—It ought to have been delivered *omnibus partibus*. Cro. E. 885. S. C. Hunsage v. Meale and Smith.—Mo. 642. S. C.

7. In trespass if plaintiff declares *Quare defendentes apud D. clausum suum frugerunt & intraverunt & solum querentis adtunc & ibidem effoderunt & mille carectatas soli ad valentiam 10 l. & 100 pecias maheremii ipsius querentis ad valentiam 200 l. adtunc & ibidem inventas ceperunt & asportaverunt &c.* Tho' it is not said that the *mille carectatae soli* were *provenientes of the said digging of the land*; nor is it directly said that the *mille carectatae soli* were *the soil of the plaintiff*, yet upon the whole the declaration shall be so taken: for tho' the words (*ad valentiam*) are interposed between the soil and maheremium, and the words (*ipsius querentis*) come immediately after the maheremium, and before the words (*ad valentiam*) so that the words (*ipsius querentis*) seem to be restrained to the timber, and not to extend to the soil, yet because all come under the words *ceperunt & asportaverunt*, it is good enough; and so the words (*ipsius querentis*) shall have reference as well to the soil as the timber. Trin. 23 Car. B. R. between Barret and Johnson, adjudged, it being moved in arrest of judgment upon a trial at bar, which concerned the haven of Yarmouth in Suffolk. Intratur Hill. 22 Car. Ros. 561.]

This case agreed by Gould J. for that by virtue of the copulative the (*ipsius querentis*) goes to all. Trin. 2 An. 2 Salk. 640. Joice v. Mills.—Agreed per Cur. 6 Mod. 15. S. C.

8. *Præcipe quod reddat of the manor of D. and S. and of three houses and 20 acres of land, 10 acres of meadow, and 40 acres of pasture in A. B. and C.* And per Cur. it shall not be intended by the copulative, that the manors are in A. B. and C. but that they are villis by themselves, and that the houses and land lie in A. B. and C. Br. Relation, pl. 47. cites 14 E. 4. 7.

9. Debt upon bond for performance of covenants in an indenture; one was, *that the indenture of lease at the time of the assignment is a good, true and indefeasible lease, and that (the cove-* nantee)

Saund. 58. S. C. by name of GAIN-

**FOURTH**  
**v. GRIF-**  
**FITH;** and  
judgment  
for the  
plaintiff.

\* Orig.  
(semble).

nantee) *shall enjoy &c. without the lett or interruption of* (the covenantor) *or any claiming from, by, or under him.* The question was whether (*indefeasible lease*) shall be construed \* as a distinct sentence, or with reference to the last words, (*without the interruption of &c.*) the Court upon several arguments \* inclined, that the last words do not mitigate or qualify the first, but are distinct clauses, tho' they allow'd the rule, that restraining words at the beginning or at the end of the sentence, shall govern the whole; but here they are as distinct as the last words; (that he shall enjoy it without the lett or interruption) cannot without impropriety of speech be applied to the first clause of (*indefeasible lease.*) Sid. 328. Pasch. 19 Car. 2. B. R. Gamforth v. Griffith.

See Condition,  
(M. b.)  
pl. 3. 4. 9.

(E) *Relative.* In what Cases they ought to refer to the next Antecedent.

[1. I F A. be bound in an obligation, whereof the condition is, *that he and B. his wife will levy a fine of such land to C. and D. and their heirs, and at their costs and charges.* This word (*and*) makes a new sentence, and so the obligor is bound to do two things, scilicet, to levy a fine, and to levy it at his own costs and charges, and not at the costs of the conusees, and so those words do not relate to the next antecedent. H. 4. Ja. B. R. per Curiam.]

[2. If in the county of N. be the parish of Road, and in this parish is a vill call'd Road, and another vill call'd Aston, and four houses of another vill call'd Hartwell in this parish of Road also, and the King grants to another the manor of Hide, and all the lands thereto appertaining in parochia de Road, & omnes decimas in tenura de Wake nuper pertinentes monasterio Sancti Jacobi in Road & Aston, & omnia terras redditus & hereditamenta in Road prædicta, and the King had not any land, tenement or hereditament in the parish of Road, but those before granted: it seems that Road prædicta shall not have reference to Road the vill the next antecedent, but to the parish, and so the tithes which the King had in Hartwell within the parish shall pass; for Road the parish was only named before by itself, for Road the vill was named with Aston, and so prædicta shall not have reference to it. Mich. 38, 39. El. B. R. between Farmer and Wix. But dubitatur.]

—\*Brownl.  
74. S. C.—  
Dy. 226. in  
marg. cites  
S. C. by the  
name of Pyc  
v. Coe, and  
says, the  
bond was to  
pay 100l.

the 19th November next ensuing, and another 100l. the next December ensuing; and adjudged that the

3. If a man by obligation, dated 6 April 12 Ja. be bound to pay 10l. the 28th day of April next ensuing the date hereof, those monies are not payable till April 13 Ja. for the (next ensuing) shall refer to the month of April, not to the 28th day. Hill. 12 Ja. B. between Road and Abingdon, per Curiam. Contra Mich. 13 Ja. B. between \* Price and Coe adjudged, the intent of the parties being found to be so.]

the first 100 l. shall be paid the 19th day of the same November, and that the intent of the party appeared by the appointment of the second payment of 200 l.

4. If obligation be made 23d May for payment of money upon 24th of May next ensuing, this doth not refer to the month, but to the day, properly and of itself, without finding of the intent of the parties, Mich. 21 Jac. B. R. adjudged between \* Prefcitt and Gwinn. P. 21 Ja. B. R. per Curiam, between † Bulkley and Hilbank.]

\* Cro. J. 646. S. C. † Cro. J. 677. S. C. An obligation bore date the 5th of May, and the con-

dition was to pay 20 l. the 11th day of May next ensuing; it was adjudged that this shall be intended the next 11th day of the same May in which the obligation was made, and not the next May, and month of May following. 2 Roll. Rep. 255. Mich. 10 Jac. B. R. Anon.

A bond was dated in March, to be paid super vicifimum octavum diem Martii prox. sequentem. It was argued that (sequentem) refers to the day, which shall be understood of the same month; and that if it had been (sequentis) then it had referr'd to March, and so it had been payable the next year. But the Court was of opinion that it should be understood the current month. 1 Mod. 112. pl. 8. Pasch. 26 Car. 2. B. R. Anon.

But tho' a bond dated 5 March, conditioned to pay 20 l. the 25th March next, shall refer to the day, and not to the month, yet such a construction shall never be made to lose a debt, destroy an indentment, or vacate a judgment, but only when 'tis in maintenance of them. Per Cur. 2 Show. 160. Pasch. 33 Car. 2. B. R. The King v. Forbis.

[5. But if it be found that the intent was, that it should be referr'd to the month the Court shall judge so. Held in the Case of Bulkley.]

S. P. If the circumstances of their agreement had

been found, and that it was intended to be May twelvemonth following, per Doderidge and Haughton J. But per Lea Ch. J. (next following) shall not be referr'd to May next following, unless some matter in the same deed might be shewn, and not a collateral agreement found by the jury, nor any collateral deed. Cro. J. 677, 678. Trin. 20 Jac. Rot. 32. S. C. by the name of Buckley v. Guilbank.

[6. In a trespass, if the plaintiff counts Quare clausum suum fregit vocatum G. abutting upon the land of A. &c. in D. where the use is to count Quare clausum fregit in D. vocatum &c. yet the other is good, and D. shall have reference to the close. M. 32. 33 El. B. R. Duke's Case adjudged. For the clerks say, that their form is both ways.]

[7. If the condition of an obligation to perform an award be with such clause, scilicet, so as the same award be made on this side the 8th day of July before 4 o'clock in the afternoon of the same day &c. here the last words (scilicet before 4 o'clock in the afternoon of the same day) shall not be referr'd to the 8th day, but to the day before the 8th day, and so the arbitration ought to be made before the 8th day, or otherwise is not good. And by this interpretation all the words shall stand where otherwise the first words shall be void. Pasch. 42 El. B. R. adjudged Mayor v. Browne.]

[8. If the Queen reciting two several leases made by her the 18 & 19 El. makes a lease of the scite of the manor of D. &c. and of the perquisites of the Court, which were not leased before, to commence post expirationem & sursum redditionem of the said two several leases, reddendo inde extunc annually 78 l. in forma sequenti, videlicet, 36 l. for the scite and 6 l. for the perquisites &c. and reserves several other several rents upon the determination

Fol. 252.

nation of the several leases. Tho' the rent for the perquisites be payable presently, yet the residue shall not be payable presently by the word (*extunc*) H. 7 Ja. B. R. between *Hall* and *Feram* per Curiam. For the word (*inde*) refers to the whole, and makes the rent payable when every lease commences.]

Brownl. 76. S. C. but reports it held that the defendant Draper shou'd levy the fine.

[9. If D. be obliged in 40 l. to M. the condition of which is to pay 20 l. upon the 23d of October following (if *Gilbert Rocket* be then living) and that he before 20th October levy a fine, and suffer a recovery of certain land. These words, (and that he shall levy a fine and suffer a recovery) refer to the next antecedent, scilicet, *Gilbert Rocket*, tho' he comes in in a parenthesis. M. 12 Ja. B. R. per Curiam, between *Mancestor* and *Daper*.]

[10. In an action upon the Case in Reading Court, if plaintiff declares that in consideration that the plaintiff would carry certain meal from Reading to London, the defendant atunc & ibidem promised to pay so much as he should deserve; upon this declaration it shall be taken, that the promise was made at London, which is the next antecedent, and so out of the jurisdiction of the Court of Reading. Mich. 9 Car. B. R. *Long* and *Atkins* adjudged in writ of error upon a judgment in Reading, and the judgment there given reversed accordingly. Intratur. Hill. 8 Rot. 217.]

[ 210 ] [11. In an action upon the Case if the plaintiff declares upon three several promises made by the defendant upon several cures to be made by the plaintiff being a physician, and shews that 20 s. was to be paid upon every of the three promises upon request quæ in toto se attingunt to 3 l. & licet ad hoc solvendum requisitus fuit &c. This is a good request, for the request shall not go to the general sum of 3 l. which is the next antecedent; for then the request should not be good. But it shall go to every several 20 s. so that it is all one as if he had said licet ad solvendum the first 20 s. and sic de cæteris requisitus &c. and so good. M. 21 Ja. B. R. between *Manowry* and *Strong* adjudged, it being moved in arrest of judgment. Shapcot attorney for the plaintiff.

12. Assise of common of turbary in S. and made his plaint to have common of turbary in 100 acres of moor, to dig, cut and carry away at his will. Trewe demanded judgment of the plaint; for your plaint is, that you have it but at will, but because this word at will is referr'd to the digging and not to the turves, therefore the plaint was awarded good. Br. Plaint, pl. 7. cites 5 Aff. 9.

13. Assise of the manor of T. except 100 s. rent, and the writ was Delibero tenemento in T. and one as tenant of parcel said, that the manor extended into T. and C. Judgment of the writ, and if &c. nul tort; and the plaintiff said, that that which was in C. was the 100 s. rent in the exception; and upon this the writ was awarded good; and yet by some the exception cannot extend but to the vill in the writ, which Bacon denied. Br. Assise, pl. 128. cites 7 Aff. 20.

Br. Relation, pl. 10, cites S. C.

14. Nuper obiit in A. B. and C. in the isle of P. the tenant said, that no such vill as A. and B. in the isle & non allocatur; for

for *iste* shall not have relation but to the last vill; but Brook says, quod mirum! Br. Brief, pl. 157. cites 7 H. 6. 8.

15. In *præcipe* quod reddat, the tenant pleaded the warranty of R. *Cōgin* of the demandant, viz. brother of M. mother of J. mother of the demandant, whose heir he is; this shall have relation that the demandant is heir of R. and not of J. his mother only; quod nota, per Cur. Br. Pleadings, pl. 150. cites 11 H. 6. 53.

16. Debt upon obligation; the defendant said, that it is indorsed upon condition, that if he appeared before the Justices of Goal-delivery such a day, or at the next Sessions, before the Justices of the Peace (reasonable warning being first had), that then the obligation shall be void &c. and said that reasonable warning was not made to him; and it was held a good plea; for these words *reasonable warning* shall have relation as well to the gaol-delivery as to the sessions, tho' the sessions are there next antecedent, and that the general warning of the sessions is not sufficient, but ought to have special warning by the plaintiff made to him. Br. Relation, pl. 21. cites 5 E. 4. 126.

17. A man is indicted by the name of J. S. servant of W. N. of S. butcher; these words (of S. butcher,) shall have relation to the master and not to the servant, and therefore ill; for then the servant is not named of any vill. Br. Relation, pl. 37. cites 9 E. 4. 48.

18. Debt of 20 l. by obligation, which was, that the obligee shall receive 5 l. by the hands of A. when K. comes to his house, and at Michaelmas 5 l. and at St. Andrew then next following 5 l. and at Christmas then next &c. 5 l. and as to that which A. should pay, and which should be paid by the hands of A. this is void and shall be paid immediately by the obligor; but by the words, that it shall be paid when K. comes to his house, therefore it is not payable 'till he comes to his house. And Brian said, as to the words (and 5 l. at the Feast of St. Michael then next following (by this he shall pay 5 l. at next Michaelmas after the making of the obligation, by reason of these words, (then next following;) for if those words (then next following) had been left out, it shall be Michaelmas next after the coming of K. to his house. Quod tota Curia concessit. Br. Obligation, pl. 56. cites 20 E. 4. 17. [ 211 ]

19. Condition was to do a thing on the 29th day of February next, he is not bound to do it 'till leap-year; for February has 29 days in such year only. Le. 101. Pasch. 30 Eliz. B. R. Anon.

20. Within the manor of D. was a place known by the name of B. in which was a house and six acres of land, to which tenement divers other lands throughout the whole manor were pertaining, and had been used with it by the space of 60 years, and had always passed by one grant, and under one rent, which was then in the hands of A. B. copyholder thereof. W. S. being lord of the manor, devised that J. S. after the death of A. B. should have the tenement with the appurtenances in which A. B. dwelleth in E. for 60 years, rendering 4 l. a year, (the ancient rent being 45 s. but the

*house and six acres were worth 5l.*) It was argued, that all the lands as well out of as within E. passed, and that the words (in which A. B. *dwellleth in* E) shall not be referred to the land, but to the tenement; for a man cannot dwell in land; and the words shall be referred, *ut verba accipiantur apte & in proprio sensu*; besides, relation shall always be *ut sententia non impediatur*, and not to the last antecedent. And here the devise was of the tenement with the appurtenances, which is all things belonging to it; and the lands out of E. were belonging to it. And adjudg'd accordingly. Cro. E. 113. Mich. 30 & 31 Eliz. Boocherv. Sampford.

Savil. 124.  
Matthew v.  
Harcourt.  
S. C.—And  
24. S. C  
founds the  
judgment on

21. Promise to pay money *next Trinity term*, and the promise was after the *essoign* day of Trinity term; this is intended the same Trinity term. Le. 210, 211. Mich. 32 & 33 Eliz. Bishop v. Harcourt.

judgment on defendant's pleading non assumpsit.

22. A man is bound to pay 20l. at *Michaelmas*, and also afterwards to pay 20l. at *the same feast*, and this was intended the same feast in another year, and not in the same year. Arg. 2 Brownl. 114. Mich. 9 Jac. C. B. in Case of Crofs v. Westwood.

D. 225. b.  
pl. 35. marg.  
Bishop v.  
Harcourt.

23. Promise to pay 10l. at or before the *first day of next Michaelmas term*; payment according to the common acceptation is good, and need not be upon the *essoign* day, but upon the *quarto die post*. 2 Roll. R. 432. Trin. 21 Jac. B. R. Condall v. Coffin.

24. R. promised, that if A. would hasten his marriage with R.'s daughter, and *should have a son within 12 months* then next following, to pay A. 100l. this will refer to the day of marriage. Vent. 262. Mich. 26 Car. 2. B. R. Anon.

25. An *indictment* for not coming to church was taken at *a sessions held 13 Jan.* anno 32 Car. 2. for that the defendant, being of such an age, on the *first of January last past*, and for six months after he forbore to come to any church or chapel &c. And upon motion to quash it, it was held per Cur. that the (*first of January last past*) shall be intended to be the month last past, and not the day. 2 Show. 160. Pasch. 33 Car. 2. B. R. The King v. Forbis.

26. An arbitration bond was dated 18 June 1684. An *award* was made 18 Aug. that defendant should seal to the plaintiff *two obligations*, each of the penal sum of 10l. *conditioned to pay 5l. on the 5th of December next after, and the other to pay 5l. upon the 1 May then next after the date of the arbitration bond, and that each should give to the other a general release of all things which had been or then were mov'd &c. between the said parties, which releases and bonds should be sealed and delivered on the 1st of December then next following at D. &c.* It was insisted, that the releases are to be made of all things which had been or then were mov'd &c. And that (then) refers to the next antecedent, which is 1 May, and then the release is of more than is sub-

mitted,

mitted, and will release the submission \* bond. But per-Cur. this cannot refer by the word (then) to the 1 May; for the last clauses [viz. the sealing and delivery of the bonds and releases] are to be done the 1 December, which is before the 1 May next after the submission. But they thought, that the (then) in the last clause referred to December next ensuing, and gave judgment accordingly Nisi &c. 3 Lev. 238. Mich. 1 Jac. 2. C. B. Barnes v. Harvey.

27. In a return to a mandamus to restore a member of a corporation it was said, that at such a time one J. B. was mayor, and that he assembled the said burgeses, and that the said J. being summoned, and not appearing, he the said John W. was removed by the said mayor and burgeses; it was objected, that the word said refers proximo antecedenti, and that is J. the mayor, so that J. W. was not summoned; but the Court held it well enough; for said shall refer to the next antecedent if it does not break the sense, as here it would do. Holt's Rep. 449. Pasch. 5 Ann. The Queen v. Truebody.

(F) In what Cases they shall relate to several Things respectively.

[1. IF A. promises B. for a certain consideration &c. to pay to B. 15 l. annually and every year during the term of 4 years then next ensuing, if J. S. tam diu haberet & occuparet a certain mesuage in D. if J. S. occupies it but one year, yet B. shall have an action for one 15 l. because the words (si J. S. tam diu occupies it) refers to every year, in as much as it is agreed to be paid annually, and so it is as much as if he had said, that he shall pay 15 l. annually for every [of the] 4 years that J. S. shall occupy it respectively. Tr. 23 Car. B. R. between Freer and Prentice. Adjudg'd in writ of error upon such judgment in Bank, and the judgment given in Bank affirmed accordingly. Instratur. Hill. 22 Car.]

2. The words \* (dimidia pars) or (medietas) shall be respectively taken for moiety divided or undivided, secundum subjectam materiam; as (medietas, of a thing to be delivered) shall be understood a divided moiety; because it cannot be delivered unless it be divided; so (dimidia pars, of a thing which cannot be reduced to a divided moiety) shall be understood a moiety undivided. 6 Mod. 231. Mich. 3 Ann. B. R. Knight v. Burton.

\* So in dower, a woman demands tertiam partem; if it be of such a thing as is capable of having a

third part divided made of it, it shall be so; but if it be of a third part of lands of tenant in common, mill &c. it must be a third part undivided. Ibid.

Fol. 253.

(G) Parols. Generalis Clausula non porrigitur ad ea, quæ specialiter sunt comprehensa.

See Grants, (H. 13) pl. 44 &c. Hob. 65. Green v. Armisteed. S. C.—And says, the word (elsewhere) shall rather be

[1.] If a man devises land in D. to B. for life, remainder to C. &c. and after in the same will devises his land in S. and elsewhere to E for life, remainder to F. in tail, and after to the said C. In this case the words (elsewhere) shall not extend to the land in D. before devised, tho' he has not any other land besides the land in D. and S: Hobart's Reports, 12 Ja. 89., between Green and Armstrong.]

surplusage and void, than by such a loose word to alter a large, plain, and particular devise before.

[ 213 ]  
2 Leon. 47.  
S. C.—cited  
8 Rep. 118.  
b. in Bonham's Case.

2. A. seised of several lands in Odiham, and likewise of the manor of Stapley in Odiham, suffered a recovery, and declared the uses of it thus, viz. that the recoveror should stand seised of all his lands in Odiham, to the use of himself and his wife, and after to other uses; and as to the manor of Stapley in Odiham, to the use of himself, and the heirs of his body, and died; and the Court held, that the wife should have nothing in the manor of Stapley; for tho' by the first part of the deed she is to have (all the lands in Odiham), yet it being expressly shewn, that the (manor of Stapley) shall be to other uses, the law shall expound it so as that every part of the deed shall stand together if it may. Cro. E. 208. 32 & 33 Eliz. B. R. Carter v. Ringstead.

### (H) Collective. Heir.

Cro. J. 144. Molineux v. Molineux S. C. and S. P. held by all the justices except Popham, who doubted upon account of the words

[1.] If a man devises that A. shall have such an annual rent as he has given to him by writing seal'd &c. and that he wills, that if his heir after his decease pays it according to this will, that he shall have the disposition of his land so long as he shall perform it, and if his heir does not perform his will; then he devises, that his executor shall have the disposition of the said land. In this case the word (heir) is nomen collectivum, and shall extend to all the heirs successively. H. 4. Ja. B. R. adjudg'd between Fretzville and Molineux.]

added, (and if my heir do not &c. then my executors shall have the ordering thereof, and my son and heir to have no meddling therewith) so that it extends only to him in words; and the intent shall not be stretched in a condition.

[2. If a man devises that every one of his younger sons and his daughters shall have a certain annuity out of certain land, and the will is further, Item I will, that if my heir do pay the said annuities, then I will that my said heir shall have the land; and if my said heir do not pay them, then I will that my executors shall have the land &c. The heir of the heir shall be charged with those annuities, for the heir of the heir is heir to the first man; and

and it was not the intent of the devisor, that the annuities should cease by the death of the first heir. H. 42 El. B. R. per Curiam. Adjudged between Purslow and Parker.]

[3. If a man makes feoffment to the use of himself for life, the remainder to another for life, the remainder *ad usum heredis vel heredum of his own body*, & *ad usum talis heredis vel heredum*, and if he dies without issue of his body, the remainder over &c. in this case his heir shall take by descent; for tho' heir be a name of purchase, yet (*vel heredum* explains it, and makes him in by descent of an estate tail) P. 12 Ja. B. adjudged between Bony and Taylor.]

[4. If A. seized in fee of a copyhold surrenders it to the use of his will, and after by his will devises it to B. for life, and after his death to the heir of his body begotten for ever: in this case the word (heir) being limited to the body of B. is nomen collectivum, and all one with the word (heirs) and so B. has a fee executed, and his heir shall have it by descent, and not by purchase; and this is not like to Archer's Case, where it is devised to B. for life, and after to his heir male, and to the heirs male of such heir male; for there the inheritance is limited to the heir male of the body of the heir male. Pasch. 1651. between Lawsey and Lowdell, adjudged in writ of error upon a judgment \* in Bank, per Cur. prater Justice Jermyn, who was of the contrary opinion. But the judgment in Bank was reversed accordingly for this error. Intratur. 1650. Rot. 279.]

G. Treat of Ten. 254. says, it seems it must be intended of a fee tail; because the heirs are restrained to the body of B.

\* Fol. 24.

[ 214 ]  
Devise to Serjeant Miller and

his wife for their lives, remainder to the next heir male of their two bodies; it was held, that this was a devise in tail; for a devise to the heir male is a devise in tail, unless there are words of limitation superadded, so as to bring it within the reason of ARCHER'S CASE; but the words (*first, next, or eldest*) or any like words superadded, make no difference. Rob. of Gav. 96. Mich. 10 Geo. 1. B. R. Miller v. Seagrave.

A. devised to his first son W. for life, remainder to the heirs males of his body, remainder to his second son T. for life, and after his death to the first heir male of his body, remainder to the third son C. and the heir males of his body, remainder in like manner in tail male to the fourth, fifth &c. sons: the Court held, that the words (heir male) were to be understood collectively, and that T. the second son took an estate tail, it appearing to be the intention by the other devises; and it differs from ARCHER'S CASE, no limitation being superadded to the words (first heir male) and the word (*first*) shall be understood first in order of succession from time to time. And a judgment given in C. B. was affirmed. Rob. of Gav. 96. East. 8 Geo. 2. B. R. Dubber on the demise of Trollop v. Trollop.

Devise of gavelkind to A. and his wife for their lives, remainder to the next heir male of their bodies for ever. The husband and wife have issue three sons, and die; per Dalison J. the eldest shall take the whole by purchase, and have a fee by reason of the word (*for ever*); but Portman Ch. J. and Whiddon J. were of opinion, that all the sons should inherit. Rob. of Gav. 95, cites a MS. note of D. 132. pl. 5. and that it was the Case of May v. Milton and Hammond.—And, it seems, with equal reason may the word (heir) be understood as nomen collectivum, where the lands are gavelkind, as all the sons are in judgment of law but one heir; and then the words in this case will create an estate in special tail in the first takers, which will descend to all the males; for the law will without difficulty reject the word (*next*) in favour of the customary inheritance; or it may naturally enough be taken to signify the nearest in course of succession from time to time. Ibid. 96. 97.

5. Heir is nomen collectivum. Arg. Bull. 219. cites 16 H. 7. 15. and 19 H. 8. 10. and 42 Eliz. in Parslow and Parker's Case. Bull. 221. cites the Case of Check v. Dale.

(I) Collective Words. *Other Words.*

Br. Brief,  
pl. 209.  
cites S. C.

1. **T**respas quod cepit piscem &c. and counted of several fish, as pikes and carps; it is good; for pisces is nomen collectivum, which has no plural number. Br. General Brief, pl. 9. cites 4 H. 6. 11.

2. *Vastum* is nomen collectivum. Br. Brief, pl. 207. cites 4 H. 6. 11.

\* D. 207.  
b. pl. 14.—  
So the word  
*farm* is a  
collective  
word con-

3. The words \* *manor, monastery, rectory, castle, honour, &c.* are compound things, and may contain mesuages, lands, meadows, woods &c. under them. Pl. C. 170. a. b. 3 Ma. 1. Hill v. Grange.

sisting of divers things collected together, viz. as mesuage, lands, meadows, pasture, woods, commons, and other things lying near, and belonging to it; per Dyer Ch. J. and Brown J. Pl. C. 195. 1 Eliz. Wrottesley v. Adams.

4. In trespass quare clausum, et *domum suam* fregit, defendant pleaded, and put the plaintiff to a new assignment, viz. a house called a *stable*, a barn and another house called a *carthouse* and *granary*; and this was urged to be error, for that this assignment is not warranted by the declaration. But per Gawdy, it is well enough; for domus in the declaration contains all things mentioned in the new assignment. But if the declaration had been of a close, and the new assignment of a barn, it had not been good. Per Wray Ch. J. (domus) est nomen collectivum, and contains many buildings, as barns, stables &c. And of this opinion was the whole Court. 2 Leon. 184. Mich. 32 Eliz. B. R. Hore v. Wridlesworth.

In an assise  
de libero te-  
nemento, it  
was object-

5. *Tenementum* is nomen collectivum, and may contain land, or any thing which is holden. 13 Rep. 48. Trin. 7 Jac. John Bailie's Cafe.

plaintiff had joined in one plaint two freeholds, the one of them being of four acres of willows (at common law) the other of estovers in 100 acres of wood, (by the statute of West. 2. cap. 25. Sed non allocatur; so likewise one plaint of two rent services was awarded good; for (liberum tenementum) tho' it be in the singular number, is yet nomen collectivum. 8 Rep. 47. b. in Jchu Webb's Cafe.—cites 11 Aff. 13.

1 Brownl.  
61.—Hob.  
276.

6. *Durante termino pradieto* shall have reference to every term demised by the deed. 10 Rep. 107. Mich. 10 Jac. Lofield's Cafe.

Trial 667.  
(C. c) pl. 1.  
Mo. 531.  
Blackwell  
v. Eyres.—  
Cro. E.  
333. S. C.

7. If several issues be join'd, and the Court awards a venire ad triandum exitum illum &c. the word exitus may be for the whole, reddendo singula singulis. Hob. 66. Ledsham v. Rowe and Mudge.

8. Habeas corpus cum causa issues; the word *causa* is nomen collectivum, and if the officer returns not all the causes, it is an escape in him. 2 L. P. R. tit. Habeas Corpus. 2.

[9. Tho'

9. Tho' the word *children* may be made nomen collectivum, the word *issue* is nomen collectivum itself; per Hale. Arg. Vent. 231. Mich. 24 Car. 2. B. R. in Case of King v. Melling. — But when it is a word of purchase, it is not, so as to take in the descendants to all generations. Gibb. 21. in Case of Shaw v. Way.

10. Devise to A. and if he dies not having a son, then to remain to the heirs of the testator. Son was there taken to be used as nomen collectivum, and held an intail; per Hale. Vent. 231. cites Hill. 42 & 43 Eliz. Bifield's Case.

11. In debt upon a bond against an executor he pleads *several judgments in bar*. Plaintiff replies, that *placitum prædictum* est minus sufficiens &c. because &c. Upon demurrer to the replication it was objected that the word (placitum) goes only to one of the judgments, and then there is a discontinuance. But the Court held, that all the judgments make but one bar, and therefore the word (*placitum*) in the replication answers the whole. Sid. 429. Mich. 21 Car. 2. B. R. Hancock v. Prowt.

The word (placitum) is nomen collectivum; per Cur. 1 Sand. 338. S. C. — Dubit. 1 Salk. 219. Combe v. Talbot. — Placitum

*prædictum* is a genus, that contains a *plea*, *replication* &c. or a *demurrer*, and several books were cited, where a demurrer is called placitum; per Holt Ch. J. Skin. 551. WILSON v. LAW. — Resolved Carth. 334. S. P.

In the like case it was held by the Court to be a discontinuance; for it is uncertain to which of the pleas the word (placitum) refers; and whichever it refers to, yet the other two remain unanswered, and the whole is discontinued. Yelv. 65. Trin. 3 Jac. B. R. Middleton v. Chefeman.

12. In covenant it was objected upon demurrer, that the breach related to *three covenants*, and the conclusion was, (et sic *conventionem* suam prædictam fregit) in the singular number, without shewing what covenant in particular: but it was answered, that (conventio) is nomen collectivum; and if 20 *breaches* had been assigned, he still counts (de placito quod teneat ei *conventionem* inter eos fact'); and of that opinion was the Court, and that the breach being of all three covenants, the recovery in one would be a good bar in any action afterwards to be brought upon either of those covenants. 2 Mod 311. Trin. 30 Car. 2. C. B. After v. Mazeen.

13. Holt Ch. J. seem'd to be of opinion, that *tempus* is not nomen collectivum. Skin. 309. Hill. 3 W. & M. B. R. in Case of Parker v. Harris.

[For more of Parols [alias, Words] in general, see Arbitrement, Condition, Covenant, Devise, Grants, and other proper Titles.]

## Particular Estate.

## (A) Pleadings.

\* S. P. Br.  
Pleadings,  
pl. 20. cites  
15 E. 4. 6. 8.

1. **H**E who claims by \* *tenant for life*, \* *tenant in tail*, *parson of a church* &c. who are particular tenants, ought to *aver the life of the particular tenant* in his pleading. Br. Pleadings, pl. 24. cites 19 H. 6. 73.

2. In the case of *parties, or privies in interest*, who come to a particular estate deriv'd out of another, which requires a deed to create it, as in the case of the King's patent, or a lease of a Corporation, or in case of the grant of a rent, or of any other thing which lies in grant, the first patent or deed ought to be shewn; otherwise of those who come to such things by act of law; as tenant by elegit, or statute, tenant in dower, tenant by the curtesy, &c. Jenk. 305. pl. 80.

3. In *debt for rent* upon a lease parol, the defendant pleaded that the plaintiff nil habuit in tenementis tempore dimissionis; the plaintiff replied, that J. S. being seised in fee, convey'd it to R. N. for 99 years; the estate of which said R. N. by several mesne conveyances came to the plaintiff, by virtue whereof he was possessed, and demised to the defendant as aforesaid; and upon demurrer to this replication, it was adjudged that it was ill, because the plaintiff did not shew how he came by the term. Raym. 389. Trin. 32 Car. 2. B. R. Rider v. Hill.

Because that  
gives him a  
good title  
against all  
men, except  
the dis-  
seisee. But  
now partic-  
ular estates

4. In all *bars, avowries and replications*, where a title is made under a particular estate, be it *for years, life, or in tails*, the commencement of such estate must be shewn; for in those parts of pleading, none but the general estate in fee simple, (which may be gain'd by wrong, as by disseisin) may be generally alleged; per Cur. Carth. 445. Pasch. 10 W. 3. B. R. Silly v. Dally.

are not the framed by law, but by contract; and therefore you must shew what that contract is, and how it came to be made, if it is carved out of an estate that is able to support it. 12 Mod. 197. Silly and Dally.

2 Vent. 182.  
Adams v.  
Crois. S. P.  
— S. P. So  
where the  
party comes  
not in in pri-  
vity, or it be  
collateral.  
Carth. 30, 31.  
Gold v.  
Barully.

5. But in a declaration, where it is only an \* *inducement to the action*, and not *traversable*, it is otherwise; as where an action of *debt for rent* was brought by an executor for rent grown due after testator's death, who had only a term in the land for years, it is sufficient to declare that testator possessed for a certain term for years not yet expired did demise to the defendant &c. because this is grounded on a *privity of a contract*. Per Cur. Carth. 445. Silly v. Dally.

6. Debt for rent, on a demise by plaintiff to defendant; defendant pleaded that he was possessed of a lease for 41 years made to him by the Lord W. who had full power to demise; and tho' the judgment was reversed for a fault in the declaration, yet the replication was held good without setting forth a title; which Holt said was true, and that in that case it was not necessary to set out a title, for nihil habuit in tenementis was the issue; for if the defendant plead nihil habuit in tenementis, the plaintiff may reply, quod satis habuit in tenementis, viz. in feodo or any other estate, on the trial whereof he may give any other estate in evidence, the alledging any particular estate being only form, the issue being whether he had any thing in the premises. 12 Mod. 192. Pasch. 10 W. 3. Silly and Dally.

[For more of Particular Estate in general, see Estates, and other proper Titles.]

## Partition.

[ 217 ]

### (A) Of what Things.

See Parteners (A).

[1. ] If a county descend to coparceners, no partition shall be of it; because if there should be partition of it, this may be divided in process of time into so many parts, that none shall have power in the county. Bracton de acquirendis rerum dominiis. 76. b. Dod. of the nobility according to the law 40. Contra. 23 H. 3. Partition 28. Adjudg'd Da. 1. County Palatine 61. b.]

[2. By the feudal law, such dignity ought not to be divided, but the one shall have all, and shall give recompence to the others for their parts. But now, by usage, such dignity is dividable. Wesenbeck in his Prelections, cap. 6. 279.]

[3. The same law of a barony. Bracton, 76. b.]

[4. The same law of a castle, Bract. 76. b. and of the capital mesuage; for this shall not be divided. 14 H. 3. Rastal Partition. 2.]

5. Not only lands and other things that may pass by livery, but things also that lie in grant; as rents, commons, advowsons &c. that cannot pass by grant without deed, whether they be in one county

county or several counties, may be parted and divided by parcel, without deed. Co. Litt. 169.

6. Tho' partition cannot be of a *view of frank pledge*, because it is not severable, as Anderfon and Glanvill held, but Walmsley and Kingmill e contra, yet the *profits* of it may be divided: or it may be divided, that the *one may have it one time*, and the other another time; yet being demanded to have partition thereof with the manor and other things, it well lies; for it may be *entirely allotted to the one, and land in recompence to the other*. Cro. E. 760. Pasch. 42 Eliz. C. B. Moor and Brown v. Onslow.

S. P. F. N.  
B. 62. (D).

7. Partition may be made of an *advowson* by Stat. 7 Anna. 18.

### (A. 2) How it may be made, and what Partition amounts to a Partition in Deed.

1. **S** CIRE Facias; if a man has issue *two daughters* and dies seised, and they *take barons*, and *one has issue and dies*, the *baron is tenant by the curtesy*, and the *other baron and feme have issue and die*, now this is a *partition in law* during the estate of the tenant by the curtesy: and the one parcener shall have aid of the other; contrary without partition. Br. Partition, pl. 8. cites 21. E. 3. 14.

2. *Fine was levied of a manor, and the comisee rendered to the comisor for life the remainder of the fourth part towards the east to A. in fee, the fourth part towards the west to B. in fee, and so the other two fourth parts to two others, to the intent that survivorship between them should not hold place; but tho' this makes tenants in common, yet it is no partition.* Br. Jointenants, pl. 44. cites 44 Aff. 11.

[ 218 ]

S. P. F. N.

B. 62 (1).—

1 Rep. 87.

a. S. P. per

Walmsley J.

in Corbet's

Cafe. So if

two copar-

ceners of an

advowson agree

to present by

turns, this is

partition as to

the possession;

but they shall

join in writ of

right. And in

the other case

it is good as to

the possession,

and taking of the

profits, but not

as to the severance

of the inheritance.

3. A partition made between two coparceners, that the one *shall have and occupy the land from Easter until the first of August*, only in severalty by himself, and that the other *shall have and occupy the land from the first of August until the feast of Easter yearly, to them and their heirs*, is a good partition. Co. Litt. 167. a.

S. P. F. N.

B. 62. (K)

—And also

coparceners

may make

partition for

term of life,

or for years.

F. M. B. 62. (L).

—So if the partition be

made in form

fore said for

two or more years,

and each

coparcener hath

an estate of inheritance,

and no chattel,

albeit either of them

alternis vicibus, hath

the occupation but for a term of years.

4. If two coparceners have two manors by descent, and they make partition, that the one shall have the *one manor for one year*, and the *other the other manor for this year*, and so alternis vicibus to them and their heirs; this is a good partition. Co. Litt. 167. a. b.

5. Another

5. Another partition may be made between parceners which varieth from the partitions aforefaid; as if there be *three parceners*, and the *youngest will have partition, and the other two will not*, but will hold in parcenary that which to them belongs, without partition: in this case, if *one part be allotted in severalty to the youngest sister*, according to that which she ought to have, then the others may hold the remnant in parcenary, and occupy in common without partition, if they will; and such partition is good enough. And if afterwards the eldest or middle parcener will make partition between them of that which they hold, they may well do this when they please. But where partition shall be made by force of a *writ de partitione facienda*, there 'tis otherwise; for there it behoveth that every parcener have her part in severalty. Co. Litt. S. 276.

Observe, that the partition is good by consent, for consensus tollit errorem; but if it be by the King's writ, then every parcener must have her part. And here you may see that modus & conventio

vincunt legem. Co. Litt. 180.

6. Where the thing and the profits are the same, a partition of the profits is a partition of the thing. Per Holt. Ch. J. 1 Salk. 43. In Case of Bishop of Sarum v. Phillips.

## (A. 3) What amounts to a good Partition in Law.

1. *TWO coparceners, the one enters into the whole in the name of both, and the other releases to her all her right; this is a partition in law; so that the other who is impleaded, may vouch for the moiety by reason of the release, and pray aid of the other moiety, because the release countervails the partition, and so she did; and well; per Cur. nota. Br. Partition, pl. 9: cites 21 E. 3. 27.*

2. Where two jointenants are, and one recovers in assise against the other, and prays judgment to hold in severalty, he shall have it; and this is a partition and severance of the jointure. Br. Partition, pl. 11. cites 7 H. 6. 4.

3. Of partitions in law, some be by act in law without judgment, and some be by judgment, and not by a writ de participatione facienda. Co. Litt. 167. b.

4. If there be lord three coparceners, mesnes, and tenant, and one coparcener purchase the tenancy; this is not only a partition of the mesnalty, being extinct for a third part, but a division of the seigniory paramount; for now he must make several avowries. Co. Litt. 167. b.

5. If one coparcener make a feoffment in fee of her part; this is a severance of the coparcenary, and several writs of præcipe shall lie against the other coparcener and the feoffee. Co. Litt. 167. b.

6. If two coparceners be, and each of them take husband and have issue, the wives die, the coparcenary is divided, and here is a partition in law. Co. Litt. 167. b.

See aid of a common person (E. a.) pl. 6, 7, 9, 10, 11, 12.

S. P. and it countervails entry and feoffment for a moiety. Br. Aide, pl. 67. cites S. C.

S. P. Br. Partition, pl. 19. cites 10 Aff. 17. —See (E. 2) pl. 3.

[ 219 ]

(A. 4) *Good, in what Cases.*

1. IF partition be made between two parceners, where *one has no colour*, (as to an especial tail) the partition is *void*. 8 Rep. 101. b. in Sir Richard Lechford's Case.—Cites 11 Aff. 23. Wimondham's Case.
2. Partition or surrender may be made *in another county than where the land is*; per Cur. Br. Partition, pl. 6. cites 11 H. 4. 61.
3. *Equal* partition shall bind an *infant* within age; per Cur. Br. Partition, pl. 40. cites Register fol. 76, and 9 H. 6. 5.
4. If *two sisters of divers venters* make partition it is good. And so of a partition made *between the bastard eigne, & mulier puisne*. Br. Partition, pl. 13. cites 21 H. 6. 25.
5. In writ of partitione facienda, where there are two parceners and *two manors*, the sheriff may assign the *one to the one*, and the *other manor to the other*. Br. Dower, pl. 72. cites 12 E. 4. 2. Per Littleton.

Fol. 225.

(B) By Coparceners. [*Of what Things.*]

- [1. C Oparceners cannot make partition of an *advowson in gross as to the right*, because it is intire; for though they make partition, this is only as to the presentment; but the advowson continues in right in coparcenary; for they ought to *join in writ of right* after. 17 E. 3. 38. b. 1 Rep. 87. Corbet's Case.]
- [2. Jointenants of a *mill* may make partition of it. 47 E. 3. 22. 47 Aff. 8.]
- [3. So parceners may make partition of a *mill*, tho' it cannot be severed. 17 E. 3. 28. b.]

S. P. F. N.  
B. 62. (F).

(C) *How it may be made; without Deed, by Par-  
ceners.*

- [1. A *Manor with advowson appendant* may be allotted to a par-  
cener without deed.]
- [2. An *advowson in gross* may be allotted to one without deed.  
Dubitatur. 11 H. 4. 3. b.]
- [3. Partition may be made *to present by turn* without deed.  
11 H. 4. 3. b. 39 E. 3. 37. b.]
- [4. A *rent for equality* may be reserved without deed. 11 H.  
4. 3. b. 11 H. 4. 61. 12 H. 4. 17. b. 21 E. 3. 2. b. 21 Aff. pl. 1.]
- [5. Upon a partition, if a *mill with a pool* be allotted to one and  
a *way to it* out of the land which the other has by the partition,  
this is good without deed. 21 E. 3. 2. b. 21 Aff. pl. 1.]

[6. Par-

[6. Partition may be made in *other county*, than where the land lies, without deed. 11 H. 4. 61. Curia.]

[7. *Jointenants* cannot make partition by parol in *other county* than where the land lies. D. 2 El. 179. 43.]

[8. *Jointenants in fee* may make partition by *indenture*. Quere. 3 H. 4. 1.]

9. Note, that partition by agreement *between parceners* may be made by law between them, as well by *parol* without deed as by deed. Co. Litt. S. 250. 1 And. 50. 12 pl. 125.

(D) By others [*than Parceners, by Deed or without.*]

[1. *Jointenants* cannot make partition by *parol* of a *franktenement*, because the one cannot compel the other to the partition, against their joint purchase. 3 H. 4. 1. per Hill. 6 Rep. 12. b. *Morris's Cafe*. Per Curiam. D. 18 El. 350. 20. per Curiam. Contra. 47 E. 3. 22. 19 H. 6. 25. b. 30 Aff. 8. Admitted. 47 Aff. 8. Adjudged. 19 Aff. 1. same Case.]

See (B) pl. 2.  
(C) pl. 7, 8.  
—Parceners  
(B) (C).

S. P. by the opinion of the whole Court. D. 350. b. pl. 20. (bis) Pasch. 18 Eliz. Anon. —And.

50. pl. 125. S. C. by name of EDEN v. HARRIS. Adjudged.—S. C. Bendl. 157. Adjudged.—Mo. 29. pl. 93. Trin. 3 Eliz. is general, without mentioning franktenement.—Serjeant Hawkins makes a quare, if parol partitions are not *restrained* by 29 Car. 2. 3. Hawk. Co. Litt. 253. (169.)

A partition between *jointenants* is not good *without deed*, albeit it be of lands, and *jointenants* are compellable to make partition by the statute 31 H. 8. cap. 10. and 32 H. 8. cap. 82. because they must pursue the act by *writ de partitione facienda*, and a partition between *jointenants* without writ remains at the common law, which could not be done by parol. Co. Litt. 169.—Goldfb. 28.—Co. Litt. 187.—So it is, and for the same reason of *tenants in common*. Co. Litt. 167.—But if two *tenants in common* be, and they make partition by parol, and execute the same in *severalty* by livery, this is good and sufficient in law; and therefore where books say, that *jointenants* made partition without deed, it must be intended of *tenants in common*, and executed by livery. Co. Litt. 169.

[2. *Jointenants* cannot make partition of a *franktenement* by *parol upon the land*; because the one cannot make livery to the other. 3 E. 4. 9.]

S. P. Cro. E. 95. Pasch. 30 Eliz. in Cafe of Docton v.

Priest.—Partition without deed is good between *jointenants* or *tenants in common*, if it be made *upon the land*. Per the best opinion. Br. Partition, pl. 27. cites 3 E. 4. 9, 10.

[3. *Tenants in common* may make partition by deed. 19 H. 6. 25. b.]

S. P. F. N. B. 62 (E).

[4. But they cannot make partition *without deed*, for want of privity, having several rights, and because they are \* not compellable to make it. 19 H. 6. 25. b. D. 18 El. 350. 20. per Curiam.]

And if they make it upon the land, it is good without deed; for it amounts to

a livery in law. But where two *tenants in common* were of a *house and land*, and they made partition within the *house* of the *house*, and land by parol without deed, and it was not found that the land was within view, so as it could not amount to a livery in law, it was for that reason adjudged for the defendant, that the partition was not good for the land, for which only the action was brought. Pasch. 30 Eliz. Cro. E. 95. Docton v. Priest.—Le. 103. pl. 136. S. C. adjudged. And as it was void for the land, it was void for the house also.—S. P. Nevertheless *contrary* between *coparceners*, who are compellable, there partition by *parol* or agreement is sufficient. Br. Partition, pl. 12. cites 19 H. 6. 25.

Fol. 256.

The father  
had issue  
two daugh-  
ters, and  
devised his

land to his two daughters, and the heirs of their bodies lawfully begotten. Per tot. Cur. a partition by parol is void; and if the one dies the other shall have all by survivor. And. 50. pl. 125. M. 16 & 17 Eliz. Edon v. Harris.—D. 18 Eliz. 350. b. pl. 20. seems to be S. C.—Bendl. 257. 16 & 17 Eliz. S. C. and the pleadings.

[ 221 ]

S. P. Per  
Wray, Cro.

E. 95.—Co. Litt. 187.—\* Misprinted for 350.—D. 350. b. pl. 20. (bis) S. P. in an anonymous case, says only that (peradventure) the partition is good.

[5. *Jointenants or tenants in common cannot make partition since the statute 31 & 32 H. 8. no more than before, tho' they are compellable to make partition by writ; for the common law in this respect is not altered by the statutes, but only where the partition is made by writ.* 6 Rep. 12. b. per Curiam. Morris's Case. D. 2 El. 179. 43 Dubitatur. D. 18 El. 350. 21. per Curiam.]

[7. *So of tenants in common of a term for years.* D. 18 El. 350. 20.]

In covenant  
the case was,  
that several  
persons be-  
ing *seised in*  
*common* of a  
large parcel  
of ground,  
and desirous  
to have  
a partition,  
submitted to  
the award  
of certain  
arbitrators  
chosen for  
that pur-  
pose, and  
entered into  
covenants

8. In *assise* between the uncle and nephew, the case was, that the two brothers purchased a mill in fee, and after by variance as to the reparations, they put themselves in award of the third brother, who awarded that one should repair so far as to a post in the mill of one part, and that the other should repair the rest of the other part for ever; and this was for the purpose to be a severance for ever, for them and their heirs; afterwards the mill was leased to farm, and one took the one moiety of the profits, and the other the other moiety; and then one died, and his heir received part of the profits, and the uncle disturb'd him, and he brought assise of the moiety, and recovered by award, notwithstanding that the partition was not by writing. Br. Partition, pl. 4. cites 47 E. 3. 24 & 19 Aff. 1. & M. 20 E. 3.—Br. Jointenants, pl. 8 & 37. cites S. C.

for the performance of it. The arbitrators by their award allotted several parts of the premises to several persons, with directions for making and maintaining fences and hedges, and awarded that *thenceforth the parties should hold in severalty*. In covenant against one of them for non-performance of the award, there was judgment by default, and damages given upon a writ of inquiry; and then it was mov'd in arrest of judgment, that the arbitrators had not made a compleat partition, having only awarded that the parties should hold severally, *without directing any deeds to carry the partition into execution*, and to vest the respective shares in the particular persons. And of this opinion was the Court, after time taken to consider; for that Co. Litt. 166. cited in behalf of partitions without deed, mentions it only as between parceners, and in the same page expressly says, it is not good between jointenants without deed, adding, that wherever the books allow of a partition by jointenants without deed, it must be intended of tenants in common, and that too executed by livery. This was at common law; a fortiori since the making the *stat. of the 29 Car. 2.* which expressly requires that all assignments, grants and surrenders shall be by deed in writing; consequently there can be no partition now, tho' by feoffment and livery, without deed; and therefore the arbitrators ought to have directed such proper deeds to be executed; so that the award, which is the ground of the assise, being insufficient and void, the plaintiff cannot have judgment. Trin. 14 & 15 Geo. 2. C. B. JOHNSON v. WILSON.

9. Partition of an *advowson* and rent is good without deed; contrary of a grant of these when they are in grofs. Per Thirne & Hill. Br. Partition, pl. 5. cites 11 H. 4. 3.

S. P. F. N.

B. 62. (D.)

10. Partition by parol without deed is good of the reversion. Per Danby, Br. Partition, pl. 3. cites 28 H. 6. 2.

11. Par-

11. Partition is good without deed of a thing which lies in grant, because the heir is in as heir after the partition; but in case of exchange he is in as purchaser, therefore there a deed is requisite of the reversion. Per Danby, Br. Partition, pl. 3. cites 28 H. 6. 2.

12. A writ of partition was brought by the dean and chapter of C. against the bishop, upon the statute of 32 H. 8. But per 2 Justices it would not lie. But Anderfon seemed to be of another opinion. 3 Le. 162. Hill. 29 Eliz. C. B. The Dean of Gloucester's Case.

13. Partition between husband and wife of lands, if it be equal, shall bind the makers, because they are compellable to make partition: but secus of an use, because they are not compellable. Arg. 2 Le. 25. Pasch. 30 Eliz. B. R. in Case of Rofs v. Morris.

(E) By whom it may be made [on Behalf of a [ 222 ]  
Parcener Infant &c.]

[1. THE *prochein amy* of an infant may make partition with the other parcener; and this shall bind the infant if it be equal. 9 H. 6. 5.]

Br. Partition, pl. 1. contra, and that 'tis void; for

*prochein amy* or guardian, have not power to make partition but for his time only. But partition by the infant himself, or a feme covert and her baron, shall bind if it be equal. Per the best opinion; for writ of partition lies in such case; cites 9 H. 6. 5.

[2. Guardian by service of chivalry of one parcener may make partition with the other parcener; and this shall bind during his time. 9 H. 6. 5. b.]

[3. So it seems that his partition shall bind the infant, if it be equal. Contra admitted, 9 H. 6. 5. b.]

[4. If there are two coparceners, one of whom is within age, and in ward to the other, and the coparcener of full age makes partition, which is not equal, this shall not bind the infant at full age. 43 Ass. 14.]

[5. But if the infant takes baron of full age, and they lease their part for lives, rendering rent, and accept the rent, this affirms the partition during the coverture. 43 Ass. 14.]

6. Partition made by the baron of the right of his feme is good, and the feme cannot without reasonable cause disagree, as if the partition be not equal, or if the land be incumbered with action; per Danby and all the Justices. Br. Partition, pl. 28. cites 8 E. 4. 4.

## (E. 2) Good. By judgment in Assise.

Br. Assise, pl. 121. cites S. C. and that it is the same if she takes

*more of the profits than belongs to her.*—Co. Litt. 167. b. (q) says, that Britton is to the contrary and that it seems reasonable, for he must have his judgment according to the plaint, and that was of a moiety, and not of any thing in severalty, and the sheriff cannot have any warrant to make any partition in severalty or by meys and bounds.

1. **P**ARTITION shall be made by judgment in assise between parceners, where the one takes the whole profits, or makes other disseisin; contrary between jointenants. Br. Partition, pl. 16. cites 7 Aff. 10.

2. *And where upon partition the moiety of such land is allotted to the one, and the other moiety to the other, this is a good partition without severance of the land, and assise shall be brought accordingly of the moiety by plaint, and good.* Br. Partition, pl. 16. cites 12 Aff. 17.

6 Rep. 13.

—\* Br. Partition, pl.

21. S. C.—

Tho' some

books are,

that judg-

ment shall

be given to

hold in se-

veralty in the

case of jointenants,

as 10 E. 3. 40. and 10 Aff. 17.

Ld. Coke thought it would be

hard in law to maintain the judgment; for besides that he ought to recover according to his plaint,

he ought also to recover in the assise by view of the recognitors, and they had no view of any thing

in severalty; and likewise this would be to the plaintiff's prejudice, as well for the survivorship as

for warranty &c. and with this accords, 28 Aff. pl. 35. where the case was adjudged, not upon any

opinion at the assises, but upon adjournment in Bank, and there adjudged that the plaintiff recover

generally, tho' the plaintiff himself pray'd judgment to hold in severalty; for the prayer

of the party shall not alter the judgment of the law. 6 Rep. 13. a. in a note in Mer-

rice's Case.

3. If two jointenants are, and one disseises the other and he brings assise, the judgment was, that he recover the moiety to hold in severalty, and the same law of coparceners. 7 Aff. 10. But \* 28 Aff. 35. is contrary, and the reason seems to be, because the severance would defeat the survivorship, which shall not be by law, unless they assent, but between coparceners there is not any survivor. Br. Partition, pl. 35. cites 10 Aff. 17.

4. In assise purparty was pleaded, upon which they were at issue, and it passed for the plaintiff, by which he according to his prayer had judgment to hold his part in severalty, notwithstanding that he may have writ of partition against the other. Br. Partition, pl. 36. cites 12 Aff. 17.

## (F) Equal. What shall be said equal.

[1. **T**H<sup>O</sup> the partition be equal in the value of the land, yet if it be not of so good avail to the one as to the other, this is not equal. 9 H. 6. 5. b.]

[2. As if the one part is incumber'd with an assise and the other not, this is not equal. 9 H. 6. 5. b.]

[3. So if the one part is convenient to the one, and the other part lies in a place inconvenient to the other, this is not equal, tho' the land be of equal value. 9 H. 6. 5. b.]

Br. Parti-

tion, pl. 1.

cites S. C.

\* Orig.

(*asse*) Br.

Partition,

pl. 1. cites

S. C.

4. If

4. If there are *three houses of different value to be divided between three*, it would not be right to divide every house; for that would be to spoil every house; but some recompence is to be made, either by a sum of money, or rent for owelty of partition, to those that have the houses of less value; per Ld. C. Parker. Wms's Rep. 447. Trin. 1718. in Case of Ld. Clarendon and Bligh v. Hornby.

But if there be but one house or mill or advowson to be divided, then this intire thing must be divided into so many

parts, but not where there are other lands which may make up the other's shares; per Ld. C. Parker. Ibid.

### (G) Rent for Equality. *What shall be good Grant of a Collateral Thing for Equality.*

[1. If the part of the one coparcener is of *more value than the part of the other*, she may grant a rent to the other for equality, and this shall be good partition. 29 Aff. 23.]

As if two houses descend to two parceners, and the one

house is worth 20s. per ann. and the other but 10s. per ann. one parcener may have one house and the other parcener the other house; and she who has the house worth 20s. per ann. and her heirs shall pay 5s. per ann. issuing out of the same house to the other parcener and to her heirs for ever. Co. Litt. f. 251.

[2. If upon partition the one grants a rent to the other, and that *if the said rent be arrear, he may levy it of his land*, tho' the rent be granted generally, not expressing to be taken of any soil, yet the clause subsequent explains it, and therefore shall issue out of the land divided. 29 Aff. 23. adjudged.]

[3. So if upon partition the one grants a rent to the other generally for equality of partition, without mention to be taken of any soil, and without more; yet this shall issue out of the land so divided, and shall be good partition; for inasmuch as it is expressed to be for equality of partition it cannot be otherwise taken: 29 Aff. 23.]

Fol. 257.

[4. Baron and feme may grant a rent for equality of partition, and this shall bind at least during the coverture. 29 Aff. 23: adjudged.]

5. Upon a partition made by jointenants, a rent cannot be reserv'd for equality of partition; for they are in by purchase, and were not compellable by the common law to make partition. Le. 27: in Case of Marsh v. Smith,—cites 26 H. 8. 4. 9 E. 4. 5.

[ 224 ]

(G. 2) Owelty. *What may be granted for Owelty of Partition; and in what Cases good without Deed.*

Br. Nufance, 1. A \* *Way or † rent-charge* may be reserved upon partition for equality thereof without deed, and good. Br. Reservation, pl. 11. cites 21 E. 3. 2.  
 common of  
*estovers, or corody, or a common of pasture.* Co. Litt. 161. a. b. — \* S. P. Br. Reservation, pl. 48.  
 — Br. Monstrans, pl. 45. cites S. C. — Pl. 7. cites S. C. — † Br. Partition, pl. 7. cites S. C.

S. P. and if 2. Partition is good and shall bind without deed or fine, and rent may be reserv'd upon it without deed or fine; and *adwovson* which was *appendant* be reserved *if the land be in tail, the rent shall be in tail likewise, and of the same condition as the land was.* Br. Partition, pl. 25. cites 2 H. 7. 5.

partition of the land, this makes the adwovson in gross, notwithstanding that it was appendant before. Br. Reservation, pl. 24. cites 2 H. 7. 5. — S. P. Br. Partition, pl. 32. cites 11 H. 4. 61. says it is good without deed, tho' rent be reserved upon it for equality of partition; for this stands with common right.

\* See (D) 3. Partition by parceners might at law be by parol, and rent *or estovers* which lie in grant might be reserved or granted without deed for equality of partition out of the lands descended, but not out of other lands, and rent so reserved or granted is distrainable of common right, tho' it be not rent service. *But\* quere if parol partitions be not restrained by 29 Car. 2. 3. Hawk. Co. Litt. 253. (169)*

Pl. C. 134. 4. If the rent be granted generally (out of no land certain) for owelty of partition *pro residuo terræ*, it shall be intended out of the purparty of her that grants it. Co. Litt. 169. b.

5. If rent be granted out of other lands than descended to the coparceners, then there must be a deed. Co. Litt. 169. b.

(H) *In what Manner they shall have the Thing parted. [Coparceners.]*

[1. I f a county palatine descend to diverse coparceners, and they make partition, every one of them shall have a several county palatine, and the liberties and prerogatives in it. Da. 1. County Palatine 61. b. 23 H. 3. Partition 28.]

[2. So if coparceners of a manor make partition, every one shall have a several manor and court baron. Da. 1. 61. b.]

[3. If there are three coparceners, and 10 l. rent is granted to one, and 10 l. rent to the other of them for equality, tho' this rent be granted severally, yet they are coparceners of it; for they may join in one scire facias for it against the third. 29 Aff. 23. adjudged.]

(I) The

(I) The several Ways of making Partition ; and of the Election and Privilege of the Eldest and her Issue.

1. PARTITIONS between parceners are either *express* or *imply'd*; of *express* partitions there are *four by consent*, and *one by compulsion*. The *first* partition by consent is, when they agree to divide the lands into equal parts in severalty, and that one shall have such a part, and another such a part &c. The *second* is when they agree that *some friends shall divide* the lands into equal parts, and then the eldest shall choose first one of the parts so divided &c. unless they otherwise agree. The part chosen by the eldest is called *enitia pars*; because this \* *privilege is personal to the eldest*, being given to her out of respect to her age, and descends not to her issue; for if she die the next eldest shall choose first. But if they have an *avowson*, the law gives the first presentation to the eldest, if they cannot agree, and this privilege goes to her issue, assignee, or tenant by curtesy. The *third* partition is when the eldest divides, and in such case she shall not choose. The *fourth* is when after the land is divided they *cast lots* for their shares. The *express compulsory partition* is by writ *de partitione facienda*, the words of which are Cum eadem A. and B. in simul & pro indiviso teneant tres acras terræ &c. Hawk. Co. Litt. 251. (166.)

\* The eldest sister shall not have the first election, but the sheriff shall assign to her her part, which she shall have &c. And it may be that the sheriff will assign first one part to the youngest &c. and last to the eldest &c. Co. Litt. f. 249. — Whether the grantee of the eldest shall have such privilege was doubted by

Frowike, but he inclined that he should. But see Kclw. 49. pl. 5. 18 H. 7. Anon — It was held by three Justices, that the grantee should have the privilege, but Anderson doubted; but he agreed that tenant by the curtesy should have the same advantage, as the wife should have had. Cro. E. 18, 19. Pasch. 25 Eliz. C. B. Harris and Haies v. Nichols. — Avowson descended to two coparceners, the youngest was within age and in ward, the guardian married with the eldest, the church avoided, the guardian presented in the name of both sisters. Afterwards the younger sister came to age and the church avoided again. It was thought by several that the eldest shall have the presentment, if the youngest will not join with her; for this shall be said the commencement of her turn, inasmuch as she had not the turn at the last avoidance, but that the same was made indifferently in the name of both. But others held the contrary. Quere. D. 55. a. pl. 5. Pasch. 34 & 35 H. 8. Carow's Case. — The privilege of the eldest to make the first presentation is not in respect of her person only, but as it is annexed to the estate also; for as it is agreed 5 H. 5. 10. b. her baron who is tenant by the curtesy shall have it. 3 Rep. 22. b. in Walker's Case.

2. Note, That the word *tenet* in a writ always implies a tenant of the freehold; therefore if one of them be *disseised by the other*, no writ of partition lies; and if one of them make a lease for life, the other shall not have a writ of partition against her; but against her lessee she shall; and if one make a lease for years, yet the other may have a writ of partition against her. Hawk. Co. Litt. 252. (167).

3. There are also several *implied* partitions in law; as if there be three parceners of a messuagium, and one of them purchase the tenancy, this is a partition in law, and extinguishes the messuagium for a third part, and the lord must make several avowries. Hawk. Co. Litt. 252. (167).

4. *And if one parcener infeoff a stranger of her part, the other parcener and the feoffee are tenants in common.* Hawk. Co. Litt. 252. (167).

5. *And if both of them marry and have issue and die, leaving husbands tenants by curtesy, the parcenary is divided, and several præcipes lie against the tenants by curtesy &c.* Hawk. Co. Litt. 252. (167).

6. *But if one recover against the other in assise or nuper obiit; yet they remain parceners; for as the plaint was for a moiety, the judgment and execution must be pursuant thereunto.* Hawk. Co. Litt. 252. (167).

[ 226 ] (K) *In Hotch-pot.* *What; and in what Cases to be made.*

1. **P**Utting in hotch-pot is, where the other lands or tenements not given in frank-marriage descend from the donors in frank-marriage only; for if the lands descend from the father, mother or brother of the donor, and not from the donor, the donee in frank-marriage shall have her part as if no such gift had been; because she was not advanced by them but by another. Co. Litt. f. 272.

If the donees will put the land into hotch-pot, then the other coparcener shall out of the remnant

make up her part equal, but the donees must do the first act. Co. Litt. 176. a. b. — And if the parcener to whom the land in fee simple descended will not put the lands into hotch-pot, then may the donees enter into the fee simple lands, and hold them in coparcenary with her. Co. Litt. 176. b.

2. If a man hath two daughters, and giveth with the eldest in frank-marriage part of his lands, and dieth seised of the remnant of greater value; in this case neither the husband or wife shall have any of the remnant, unless they will put their land given in frank-marriage in hotch-pot with the remnant with this sister. Co. Litt. f. 266, 267.

3. If the donees die before such partition their issues shall upon the putting into hotch-pot, have the same benefit; for it is inheritable, and descendible to the issues. Co. Litt. 178. a.

The value shall be accounted as it was at the time of the

partition; for if the donor purchase more land after the gift, or if the land given in frank-marriage be by the act of God decayed in value, or if the remnant of the lands in fee-simple be improved after the gift, or e converso, the law shall adjudge of the value as it was at the time of partition, unless it was by the proper act or default of the parties. Co. Litt. 179. a.

For of lands intail'd, the donee in frank-marriage shall have as

much part as the other coparcener; because the issue in tail claimeth per formam doni, and both the parceners must equally inherit by force of the gift, & voluntas donatoris &c. observetur. Co. Litt. 179. b.

4. Lands or tenements given in frank-marriage shall not be put in hotch-pot, nor unless where lands descend in fee-simple; for of lands descended in fee-tail, partition shall be made as if no such gift in frank-marriage had been made. Co. Litt. f. 274.

6. No lands shall be put in hotch-pot with others, *unless lands which were given in frank-marriage* only; for if a feme has any other lands or tenements by any other gift in tail, she shall never put such land so given in hotch-pot, but she shall have her purparty of the remnant descended &c. viz. as much as the other parcener shall have of the same remnant. Co. Litt. f. 275.

For if the ancestor in-  
feoffeth  
one of his  
daughters of  
part of his  
land, or  
purchaseth  
to him and

her, and their heirs, or giveth to her part of his lands in tail, special or general, she notwithstanding this shall have a full part in the remnant of the lands in fee-simple; for the benefit of putting &c. into hotch-pot is only appropriated to a gift in frank-marriage, (quia maritagium cadit in partem) which shall be accounted as parcel of his advancement. Co. Litt. 179. b.

# (L) *The Effect of a Partition; and how seised after.*

1. Partition between two sisters and heirs to the father is a good bar in assise between them, tho' the one sister only be heir by special tail; and this is by reason of privity of blood: but partition between strangers to the blood, is no bar. Br. Partition, pl. 20. cites 11 Aff. 23.

S. P. Br.  
Affise, pl.  
468. cites  
[ 227 ]  
11 E. 3.—  
But this  
partition be-

ing made during coverture of the sister by the first venter, who was heir to the entail, it was for that reason avoided. Br. Affise, pl. 174. cites S. C.

2. Tho' partition be made between parceners, yet they are in by their common ancestor, and may vouch as heir, and may have every advantage as heir. Br. Quare Impedit, pl. 73. cites 21 E. 3. 30. 31.

Two jointe-  
nants are  
with war-  
ranty, and  
partition is

made between them by judgment in writ of partition, by the statute of 31 H. 8. cap. 1. it was adjudged that the warranty remains, because by the King's writ they are compellable by the statute (to which every man is a party) to make partition, and having pursued his remedy according to the statute, it shall work no wrong to him; but had they made partition otherwise than by writ, notwithstanding they were compellable by writ to make it, yet not having pursued the statute, such partition remains at common law, and consequently the warranty is gone, as is agreed, 29 E. 3. tit. Warranty. 6 Rep. 12. b. Pasch. 27 Eliz. C. B. Morrice's Case.

3. Where a manor is parted between two coparceners, each has a moiety of the manor: contra it seems where the one has all the demesnes, and the other all the services; but as long as the one has land and services, and the other likewise, each has a moiety of the manor. Br. Demand, pl. 10. cites 9 E. 4. 5.

4. Trespafs: if a manor to which a villein is regardant, descends to two parceners, who make partition, and the manor is allotted to one, and the villein and other land to the other, now the villein is in gross, and admitted for a good partition. Br. Partition, pl. 30. cites 13 E. 4. 2.

5. If two coparceners of a manor and advowson appendant make partition of the manor reserving the advowson, now they are several tenants of the lands, and jointenants of the advowson; and by this the advowson is in gross, and not appendant. Br. Partition, pl. 25. cites 2 H. 7. 5.

6. Lease to two for years with a proviso in the end of the indenture, that if they die within the term, the term shall cease. They make partition, or one aliens his part, and dies. The

lessor

lessor cannot enter, but the grantee or the *executors of lessee* (if no alienation be made, or otherwise the grantee) *shall have his part during the life of the survivor*, and there shall be no occupancy. D. 67. a. pl. 18. Mich. 3 E. 6. Farington's Case.

7. If a lease be made to two, upon condition not to alien, and they make partition, and afterwards the one *alien his part*, the whole is forfeited. D. 67. a. pl. 18. Marg. cites Mich. 31 & 32 Eliz. C. B. Croftwick's Case.

\* It remains  
in common.  
F. N. B.  
62. (F.)

8. If *advowson* be appendant to a manor, which descends to divers coparceners, and they make partition of the manor to which &c. \* *without speaking of the advowson*, the advowson notwithstanding the division and severance of the manor to which &c. remains appendant. 8 Rep. 79. b. Trin. 7 Jac. in Wyat Wild's Case.

### (M) Bound. By what Partition.

1. *If perfect partition be made*, the one parcener cannot re-enter into his part again without agreement of the other to defeat the partition; but if a stranger enters into part by elder title, there the coparcener may enter with the other, and they shall make a new partition. Br. Partition, pl. 34. cites 15 E. 4. 3.

### [ 228 ] (N) What Partitions shall bind them and the Issue, being made by Infants, Feme-Covert, &c.

1. *If the partition be of lands intailed*, or if any of the parceners be of *non sana memoria*, it shall bind the parties themselves, but not their issues, unless it be equal. Co. Litt. 166.

2. Or if any be *covert*, it shall bind the husband, but not the wife or her heirs. Co. Litt. 166.

3. Or if any be *within age*, it shall not bind the infant. Co. Litt. 166.

4. If the tenements (whereof they make partition) be to them *in fee tail*, and the part of the one is better in yearly value than the part of the other, albeit they be concluded during their lives to defeat the partition, yet if the parcener which has the lesser part in value has issue, and dies, the issue may disagree to the partition, and enter and occupy in common the other part which was allotted to her aunt, and so the other may enter and occupy in common the other part allotted to her sister &c. as if no partition had been made. Co. Litt. f. 255.

5. Husband and wife tenants in *special tail* of certain lands in fee have issue a daughter; the wife dies; the husband by a second wife has another daughter; both the daughters enter (where the eldest is only inheritable), and make partition; the eldest is

con-

concluded during her life to impeach the partition, or to say that the youngest is not heir; and yet she is a stranger to the tail, but in respect of *privity* in their persons the partition shall conclude; for a partition between *mere strangers* in this case is void; but the issue of the eldest shall avoid the partition as issue in tail. Co. Litt. 170. b.

6. If two parceners of lands in fee take husbands, and they and their husbands make partition between them, if the part of the one be less in value than the part of the other, during the lives of their husbands the partition shall stand in its force. But albeit it shall stand during the lives of their husbands, yet after the death of the husbands, that woman which has the lesser part may enter into her sister's part as is aforesaid, and shall defeat the partition. Co. Litt. f. 256.

But if the partition made between the husbands were thus, that each part at the time of the allotment made was of Litt. f. 257.

equal yearly value, then it cannot afterwards be defeated in such cases. Co.

7. The wife must be party to the partition. Co. Litt. 170. b.

8. Tho' the partition be unequal, yet is not the partition void, but voidable; for if, after the decease of the husband, the wife enters into the unequal part, and agrees thereunto, this shall bind. Co. Litt. 170. b.

9. Note, The partition shall not be defeated for the surplusage only to make the partition equal; but it shall be avoided for the whole. Co. Litt. 170. b.

10. If the parts at the time of the partition be of equal yearly value, neither the \* wives nor their heirs shall ever avoid the same, and the reason thereof is; for that the husbands and wives were *compellable by law* to make partition, and that which they are compellable to do in this case by law, they may do by agreement without process of law. If the annual value of the land be equal at the time of the partition, and after become unequal by any matter subsequent, as by surrounding, ill husbandry &c. yet the partition remains good. Co. Litt. 171.

\* S. P. F. N. B. 62. (F).—But if the partition be made by force of the King's writ, and judgment thereof given, it shall bind

the same coverts for ever, albeit the parts be not of equal annual value; because it is made by the sheriff by the oath of 12 men, by authority of law. And the judgment is, that partition shall remain firm and stable for ever. Co. Litt. 171.

But a partition in Chancery where one coparcener is of full age, and sues livery, and one other is within age, and has an unequal part allotted to her, shall not bind her at her full age; for in a writ directed to the officer to make partition, there is a *salvo jure*; and there is no judgment upon such a partition. Co. Litt. 171.

But if such a partition made in Chancery, and between coparceners, whereof one is of full, and the other within age, be equal, it shall bind, so that a part of the land holden in capite be allotted to every of the coparceners; for to that end there is an express proviso in that writ. Co. Litt. 171.

And this partition may be avoided either by *scire facias* in the Chancery, or by a writ of *partitionis faciende* at the common law at her full age. Co. Litt. 171.

11. If two coparceners be, and the youngest being within the age of 21 years, partition is made between them, so as the part which is allotted to the youngest, is of less value than the part of the other; in this case the youngest, during the time of her nonage, and also when she comes to full age, viz. of 21 years, may enter into the part allotted to her sister, and shall defeat the partition. Co. Litt. f. 258.

*And tho' the partition be unequal, and the infant has the lesser part, yet is not the parti-*

*tion void, but voidable by his entry; for if he take the whole profits of the unequal part after his full age, the partition is made good for ever.* Co. Litt. 171. b. — Nor shall an unequal partition in Chancery bind an infant. Co. Litt. 171. b.

*But a partition made by the King's writ de partitione facienda by the sheriff by the oath of 12 men, and judgment thereupon given, shall bind the infant, tho' his part be unequal.* Co. Litt. 171. b.

13. If a writ of partition be of lands in fee and lands entailed the eldest shall not be compelled to take the whole estate in tail (and so the younger sister to have the whole fee simple, both being of equal value), for the prejudice that might ensue after, but may challenge *one moiety of the lands intailed, and another of the lands in fee simple*; and this she may do ex provisione Legis. Co. Litt. 173.

14. The inequality of the value shall not impeach a partition made of lands in fee simple, between coparceners of full age and unmarried, no more than it shall do in case of an exchange. Co. Litt. 170. a.

15. A partition of land intailed between parceners, if it be equal at the time of the partition, shall bind the issue in tail for ever, albeit the one does alien her part. Co. Litt. 173. b.

16. J. S. seised of land in fee has two daughters, Rose and Anne Bastard cigne and mulier puisne, and dies, and Rose and Anne enter and make partition; Anne and her heirs are concluded for ever. Co. Litt. 170. b.

See (R).

(O) Voidable. For what Cause, and How.

1. *A*fter partition in Chancery, she who is within age shall after she comes of full age (if she has too little) have a writ de partitione facienda against her sister, or a scire facias upon the record of the partition in the Chancery against her coparcener, which shall be returned into the Chancery &c. to shew wherefore new partition or extent shall not be made &c. F. N. B. 62. (H).

Ibid. in marg. says, Nota, that so it was done, and new writ of partition awarded.

4 Car. in the Case of Taylor v. Brockhurst.

2. Upon a writ of partition the Sheriff returned the partition made by twelve lawful men. One of the defendants was griev'd with his purparty, because it was too little in value, and would have put in a surmise against the Sheriff and his partial return, and pray'd a new writ to make a more equal partition, and it was well debated if he should have it or no. D. 73. pl. 7. Mich. 6 E. 6. Anon.

3. If the Sheriff is not upon the land in person, at the executing the writ of partition, and this be shewn to the Court, they may well examine it. And in this case they examined the under sheriff, who confess'd that he was there, but not the sheriff himself; and thereupon the writ was stay'd and a new writ awarded. But after the return of the sheriff is received and fil'd, it will be too late, and the party can have no averment against the return, nor can he have error. Cro. E. 9, 10. Mich. 24 & 25 Eliz. C. B. Clay's Case.

If partition of lands be made by bayliff of a franchise, it is not good within the 31 H. 8. of Partition, but it ought to be done by the sheriff himself.

Self. 4 Le. 106. pl. 216. Mich. 25 Eliz. C. B. Howen v. Gerrard.——See 8 & 9 W. 2. cap. 31. f. 4, 5. at (U) pl. 2.

4. In a writ of partition it was found for the plaintiff, and a writ awarded to the sheriff to make the partition, and the sheriff did thereupon allot part of the lands in severalty, and for other part of the lands the jurors would not assist him to make the partition; all which appeared upon the return of the sheriff. An attachment was pray'd against the jurors, and a new writ to the sheriff. The Court doubted what to do, and took time to advise and see precedents. Godb. 265. pl. 366. Hill. 13 Jac. C. B. Bagnal v. Harvey.

### (O. 2) Voidable. *Made good, by what Act.*

1. IF there are two coparceners, and the one within age, who make partition which is not equal by 5 l. in value, there she within age may enter and defeat the partition, but if she at full age makes lease or such like act in agreement to the partition, there she shall be bound by it. Br. Partition, pl. 23. cites 43 Aff. 14.

So if she takes to her own use all the profits of the lands or tenements which were allotted unto her, by this

she agrees to the partition at such age, in which case the partition shall stand and remain in its force. Co. Litt. f. 258.——But peradventure she may take the profits of the moiety, leaving the profits of the other moiety to her sister. Co. Litt. f. 258.

2. Partition made by baron and feme, or an infant, may be affirm'd by entry when she is sole, or the infant of full age; but contrary where they waive it. Br. Partition, pl. 13. cites 21 H. 6. 25.

### (P) Voidable. How a Partition may become so. *By Matter subsequent.*

1. WHERE partition is made between two sisters, so that the one has the land of fee simple, and the other the land tail'd, if she who has the fee simple land & aliens in fee and has issue and dies, her issue shall have form'don of the moiety of the land tail'd; but if she who has the fee simple land does not alien it, but

Br. Form'don, pl. 2. cites 20 H. 6. 2. 13. S. C.——  
The issue may enter

Into the lands in tail, and hold occupy them in purparty with her aunt, and this is for two causes, one is, for that the issue can have no remedy for

but *the other aliens the land tail'd and has issue and dies*, her issue shall have the † *formedon of the whole*, tho' there be another coheir to the gift alive, and recover the whole; *but if the other aliens the fee simple after*, then her issue shall have *formedon of the moiety*: per Newton; contra, as long as the fee simple land is not alien'd; for then she is seised of her portion. Quere, where the one has recovered, if the other cannot enter with her who recovered in the formedon. Br. Partition, pl. 2. cites 20 H. 6. 14.

the land sold by the mother, because the land was to her in fee simple, and inasmuch as she is one of the heirs in tail, and has no recompence for that which belongs to her of the lands in tail, it is reason that she have her portion of the lands tailed, and namely when such partition does not make any discontinuance. Co. Litt. f. 260.—\* But the contrary is holden. M. 10 H. 6. viz. that the heir cannot enter upon the parcener who has the intail'd land, but is put to a formedon. Ibid.—

[ 231 ] \* Ld. Coke says, this is no part of Littleton, and is contrary to law, as appears by Littleton himself; and that besides, the case intended is not truly vouched; for it is not in 10 H. 6. but in 20 H. 6. [14] and yet there it is but the opinion of Newton obiter by the way. Co. Litt. 173. a.

This partition *prima facie* is good. But yet the eldest coparcener has, by the partition, and the matter subsequent, barred herself of the right in the fee simple lands, inasmuch as when the youngest sister alien'd the fee simple lands and dies, and her issue enters into half the lands intail'd, yet *shall not the eldest enter into half of the lands in fee simple upon the alienor*; for by the alienation the priority of the state is destroyed. Co. Litt. 172. b. 173. (L)—*So if the youngest daughter had made a gift in tail; for the reversion expectant upon an estate tail is of no account in law, because it may be cut off by the tenant in tail. But otherwise it is of an estate for life or years.* Co. Litt. 172. b.—If in this case the youngest daughter alien part of the land in fee simple and dies, so as full recompence for the land intailed descends not to her issue, she may waive the taking of any profits thereof, and enter into the lands intailed; for the issue in tail shall never be barr'd without a full recompence, tho' there be a warranty in deed or in law defended. Co. Litt. 173.

† S. P. For so long as the partition continues in force, she is only inheritable to the whole land in tail. Co. Litt. 173.

## (Q) Defeated in Part or in all. By Evi<sup>c</sup>tion of the Party.

1. IN avowry it was agreed, that where *two parceners make partition, where the third is extra patriam, reserving rent to the one for equality of partition, and after the third returns within age, and re-enters*, the first partition is determined; *contrary without entry*; for then the rent remains quousque &c. Br. Partition, pl. 14. cites 24 E. 3. 27.

2. Where *two manors are exchanged in fee, the one for the other, or put in partition, and one has the moiety of his manor in tail, and the other moiety in fee, and has issue and dies, and the issue enters into the whole*, the partition is defeated in all; per Litt. and other Justices. Br. Partition, pl. 31. cites 13 E. 4. 3.

S. P. 4 Rep. 121. b. in BUSTARD'S CASE, cites 13 E. 4. 3. and 42 Aff. 22. and says, that the opinion of

Cavendish there, viz. that tho' an estate for life, or in tail, be evicted against one coparcener, yet that the partition shall remain in force, is not law, as was resolved by the Court in the case there.

Viz.

vis. the Earl of Pembroke's Case. — But if she alien her part in fee before the land is recovered, she cannot enter into the other acre; for an alienation in fee dissolves the privity, but a lease for life or years or gift in tail does not. Hawk. Co. Litt. 258. (174.)

4. And tho' in the case above, the reversion expectant on a state in tail, made by the parcener, which had the fee, be of so small consideration in law, that it shall not be esteemed a recompence sufficient to bar the entry of the issue into the lands in tail allotted to the other parcener; yet in this case a reversion on a state tail, inasmuch as it continues the privity of the coparcenary, shall give the parcener or her issue all the privileges incident thereto. Hawk. Co. Litt. 258. (174.)

So when the privity of the state remains and the part of the one is evicted, the shall enter and hold in coparcenary with her other copar-

cener; and so it is in case of an exchange. Co. Litt. 173. b. 174.

5. If the whole estate in part of the purparty be evicted, that shall avoid the partition in the whole, be it of a manor that is intire, or of acres of ground or the like that be several; for the partition in that case implies for this purpose both a warranty and a condition in law, and either of them is intire and gives an entry in this case into the whole. And so it was resolv'd both in the case of exchange and of partition. Co. Litt. 173. b. 174.

6. If any estate of freehold be evicted from the coparcener in all or part of her purparty, it shall be avoided in the whole. As if A. be seised in fee of one acre of land in possession, and of the reversion of another expectant upon an estate for life, and he disseises the lessee for life, who makes continual claim, and A. dies seised of both acres, and has issue 2 daughters; partition is made so as the one acre is allotted to the one, and the other acre to the other; the lessee enters, the partition is avoided for the whole, and so it was resolv'd. Co. Litt. 174.

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Br. Error, pl. 131. cites 42 Aff. 22. per Cavendish contra Arg. and nothing said against it. — But see Sup. pl. 3. — Yelv. 8. Mich. 44

& 45 Eliz. B. R. Buftard v. Bolter. — Cites 42 Aff. 22. Spencer's Case.

7. There is a diversity between the warranty and condition which the law creates upon the partition. Where one coparcener takes benefit of the condition in law, she defeats the partition in the whole. Co. Litt. 174.

But when she vouches by force of the warranty in law for part,

the partition shall not be defeated in the whole, but she shall recover recompence for that part. Co. Litt. 174.

(R) Writ of Partition. Proceedings therein. See (O).

1. IN partition to be made between 2 parceners of 2 manors, the sheriff may by writ assign one manor to one, and the other to the other, per Litt. Justice; nevertheless it seems that this is intended where they are of an equal value; and the same of 2 acres. Br. Partition, pl. 29. cites 12 E. 4. 2.

2. If

See (U).

2. If before the return and filing of the writ, it appears, that the *sheriff was not on the land in person*, as he is to be, the writ will not be received. Cro. E. 9. Mich. 24 & 25 Eliz. C. B. Clay's Case.

3. The process in partition is *summons, attachment, and distress*, and the process are returnable from 15 days to 15 days; if the writ be brought against two or more, *several effoigns* will lie, but *no view*, and the sheriff upon distress is compellable to *return the value of the land* from the teste of the original until the return thereof; if the writ be against *two or more defendants, and only one appears*, the plaintiff cannot declare against him, until the rest of the defendants appear. In this action there are *two judgments*, the first is, that partition shall be made, and if the plaintiff die after the first judgment, and before the second judgment, the writ shall not abate, but his heir shall have a *scire facias* against the defendants, to *shew cause* why partition should not be made; and the death of one of the defendants abates the writ; and note, the plaintiff may have a *general writ but a special count*; and if the defendant confesses part, and pleads *quod non tenet in simul & pro indiviso for the residue*, the plaintiff may have judgment upon the confession, and a writ to make partition upon the confession before the trial, and afterwards try the issue for the residue, or else he may respite his judgment upon the confession till the issue be try'd, but this is dangerous; for if the plaintiff be *non-suit* at the assize, then the whole writ will abate, and if the *sheriff return the tenant summoned when in truth he was not*, an action of *deceit* lies not, but an action upon the case, and the plaintiff shall not recover the land by default, and you shall never have a writ of partition against one, where he cannot have one against the other. Brownl. 156, 157. Anon.

4. S. and B. were *tenants in common of a lease for years*, and B. brought a partition upon the 32 H. 8. cap. 32. and the writ was general as in the register, with a *secundum formam statuti*, which made it to be a partition upon his case within the statute, as the statute limits and appoints. But it had not been good if that clause had been omitted.—And it was so ruled in one MAURICE's Case. Noy. 71. Stringborow v. Beedloe.

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5. 8 & 9 Will. 3. cap. 31. s. 1. enacts, That after process of pone or attachment returned upon a writ of partition, *affidavit being made of due notice given of the writ to the tenant to the action, and a copy thereof left with the occupier or tenant, or if they cannot be found, to the wife, son, or daughter (being of the age of 21 years) of the tenant, or to the tenant in possession, (unless the tenant in possession be demandant in the action) at least 40 days before the return of the pone or attachment; if the tenants to such writ, or any of them, or the true tenant to the lands, shall not within 15 days after return of such pone or attachment cause an appearance to be entered, the demandant having entered his declaration, the Court may proceed to examine the demandant's title and quantity of his purport, and shall for so much give judgment by default, and award a writ to make partition, whereby such par-*

part may be set out severally; which being executed after eight days notice given to the occupier or tenants, and returned, and final judgment entered, the same shall conclude all persons, altho' all persons concerned are not named in the proceedings, nor the title of the tenants truly set forth.

S. 2. Provided, that if such tenant or person concerned shall within one year after the first judgment entered, or in case of infancy, coverture, non sane memoria, or absence out of the kingdom, within one year after their return, or the determination of such inability, apply to the Court by motion, and shew a good and probable matter in bar of such partition, or that the demandant hath not title to so much as he hath recovered, the Court may suspend or set aside such judgment, and admit the tenant to appear and plead; and if the Court upon hearing thereof shall adjudge for the first demandant, the first judgment shall stand confirmed against all persons, except such other persons as shall be absent or disabled; and the person so appealing shall be awarded to pay costs; or if within such time aforesaid the tenants or persons concerned, admitting the demandants title and purparts, shall shew to the Court any inequality in the partition, the Court may award a new partition, to be made in presence of all parties, if they will appear, which second partition returned and filed shall be good against all persons, except as before.

S. 3. No plea in abatement shall be received in any suit for partition, nor shall the same be abated by the death of any tenant.

S. 6. This act shall continue seven years.

Made perpetual by 3 & 4 Ann. cap. 18.

## (S) Writ of Partition. Between what Persons, and for and against whom; and how.

1. If one coparcener makes a lease for years, yet a writ of partition lies. Co. Litt. 167.

But if one or both make a lease for life

a writ of partition does not lie between them, because non infimul & pro indiviso tenent; they don't hold the freehold together, and the writ of partition must be against the tenant of the freehold. Co. Litt. 167.

2. It lies against tenant by the curtesy; because though he be a stranger to the blood, yet he continues the estate of coparcenary, as the other coparcener did, and shall be jointly impleaded. Co. Litt. 174. b. 175.

And yet he cannot have this writ by the common law; nevertheless now

he may by the statutes of 31 H. 8. 1. & 32 H. 8. 32. ut patet. Br. Partition, pl. 41. cites 3. E. 3. — But such writ lies not against his grantee. 3 Le. 121. Arg.

3. If two coparceners be, and one aliens in fee, they are tenants in common, and several writs of præcipe must be brought against them; and yet the parcener shall have a writ of partition against the alienee at the common law, which is a far stronger case than the case put of tenant by the curtesy. Co. Litt. 175.

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4. Neither

*But now tenant by the curtesy shall have a writ of partition upon the statute 31 H. 8. cap. 32.* [which see at pl. 12.] for albeit he is neither jointenant nor tenant in common; for that a praecipe lies against the parcener and tenant by the curtesy, yet he is in equal mischief as another tenant for life. Co. Litt. 175. a. b.—S. P. Br. Partition, pl. 41.

4. Neither the tenant by the curtesy, nor (much less) the alienee of a coparcener, shall have a writ de partitione facienda at the common law; for Littleton says here, that such a writ lies only for parceners. Co. Litt. 175.

5. But it may be brought by a parcener against strangers. Co. Litt. 175.

6. If three coparceners be, and the eldest purchases the part of the youngest, the eldest having one part by descent, and the other by purchase, shall have a writ of partition at the common law against the other middle sister; et sic de similibus. Co. Litt. 175.

F. N. B. 61. (S) S. P. and see the Writ at 62. —D. 243. a. b. in pl. 55. S. P. cites the register.

\* See pl. 11, 12. —So by the custom of some cities or boroughs, one jointenant or tenant in common may compel his companion by writ of partition grounded upon the custom to make partition. Co. Litt. 187.

7. And so it is in a far stronger case; if there are three coparceners, and the eldest take husband, and the husband purchase the part of the youngest, the husband for his part is a stranger and no parcener, and yet he and his wife shall have a writ of partition against the middle sister at the common law, because he is seised of one part in the right of his wife who is a parcener. Co. Litt. 175.

8. Since Littleton wrote, by the \* statutes one jointenant or tenant in common may have a writ of partition against the other; and therefore at this day the alienee of one parcener may have a writ of partition against the other parcener, because they are tenants in common. Co. Litt. 175.

one jointenant or tenant in common may compel his companion by writ of partition grounded upon the custom to make partition. Co. Litt. 187.

9. A writ of partition lies between parceners by the custom as between females; but it is convenient in the declaration to make mention of the custom. Co. Litt. f. 265.

10. If a man has two daughters, and gives with the eldest in frank-marriage part of his land, and dies seised of a greater remaining part, a writ of partition does not lie, because non tenent in simul et pro indiviso. Co. Litt. 176. b.

11. 31 H. 8. cap. 1. f. 1. Forasmuch as by the common law of this realm, divers of the King's subjects, being seised of manors, lands, tenements, and hereditaments, as joint tenants, or as tenants in common, with other of any estate of inheritance, in their own rights, or in the right of their wives, by purchase, descent, or otherwise, and every of them so being joint-tenants, or tenants in common, have like right, title, interest, and possession in the same manors &c. for their parts and portions jointly, or in common undividedly together with other. (2) And none of them by the law does, or may know their several parts or portions in the same, or that that is his or theirs, by itself undivided, and cannot by the laws of this realm otherwise occupy or take the profits of the same, or make any severance, division, or partition thereof, without other of their mutual assents and

and consents. (3) by reason whereof divers and many of them, being so jointly and undividedly seised of the said manors &c. oftentimes of their perverse, covetous, and malicious minds and wills, against all right, justice, equity, and good conscience, by strength and power, not only cut and fallen down all the woods and trees growing upon the same, but also have extirped, subverted, and pulled down and destroyed all the houses, edifices, and buildings, meadows, pastures, commons, and the whole commodities of the same, and have taken and converted them to their own uses and behoofs, to the open wrong and disherison, and against the minds and wills of others holding the same manors &c. jointly, or in common with them, and they have been always without assured remedy for the same. [ 235 ]

S. 2. Be it therefore enacted, that all joint-tenants, or tenants in common, that now be, or hereafter shall be of any estate or estates of inheritance, in their own rights, or in the right of their wives of any manors &c. within this realm of England, Wales, or the marches of the same, shall and may be co-acted and compelled, by virtue of this present act, to make partition between them of all such manors &c. as they now hold, or hereafter shall hold as joint-tenants, or tenants in common, by writ, de participatione facienda, in that case to be devised in the King our sovereign Lord's Court of Chancery, in like manner and form as coparceners by the common laws of this realm have been and are compelled to do, and the same writ to be pursued at the common law.

12. 32 H. 8, cap. 32. enacts, That all joint tenants and tenants in common, and every of them, which now hold, or hereafter shall hold, jointly or in common, for term of life, year or years, or joint tenants or tenants in common, where one of them have, or shall have estate or estates for term of life or years, with the other that have or shall have estate or estates of inheritance or freehold in any manors, land, tenements or hereditaments, shall and may be compellable from henceforth by writ of partition to be pursued out of the King's Court of Chancery upon his or their case or cases, to make severance and partition of all such manors &c. which they hold jointly or in common, for term of life or lives, year or years, or where one or some of them hold jointly or in common, for term of life or years with other, or that have an estate or estates of inheritance or freehold.

Provided always, and be it enacted, That no such partition or severance hereafter to be made by force of this act, be, nor shall be prejudicial or hurtful to any person or persons, their heirs or successors, other than such which be parties unto the said partition, their executors or assigns.

13. Three sons, viz. A. B. and C. were heirs in gavelkind; C. alien'd his purparty to another in fee: the alienee and B. join'd in a writ of partition against A. and the writ was contra formam statuti de anno 31 H. 8. which gives writ of partition between jointenants &c. This writ was abated; for here the second son is not a jointenant, and so cannot join in this writ with

And. 30. pl. 72. S. C. for upon the matter the one son was not joint-tenant, nor tenant in

common with the other; and says that the

with the alienee. Bendl. 42. pl. 76. Mich. 2 & 3 Ph. & M. Ballard v. Ballard.

like case was adjudged between \*WOOTON AND TEMPLE V. COOKE, who was coparcener with Wootton. And says that it seems the alienee may have partition against the coparceners, and the coparceners against the alienee.—But it must be by writ. Jenk. 211. pl. 46.—D. 128. pl. 38. S. C. of Ballard v. Ballard accordingly; for they are intitled to several writs, viz. the one to the writ of coparcenary at common law, and the other by the statute; but they cannot join.—\* Bendl. 52. pl. 210. Mich. 7 & 8 Eliz. cites S. C. accordingly; and that the two coparceners may have a writ of partition at the common law against the alienee, but not upon the said statute.—So where one coparcener brought writ against the other, and the alienee upon the statute, the writ abated because he might have had a writ at common law. D. 243. pl. 56. 7 & 8 Eliz. Anon.

14. Lease was made to A. and M. his feme, and to B. and E. whom the said B. was to marry, and to C. and K. his feme for years. A. died, and M. survived; B. married E. and after the said M. granted &c. her interest to the said B. and after the said C. and K. his feme brought writ of partition against the said B. and E. his feme, and thereby claimed partition of the fourth part, according to the statute; and the writ awarded good. Note, that the baron and feme for two of the four parts are joint-tenants, and for other part the baron is tenant in common with the plaintiffs; so this writ is not between jointtenants only, nor between tenants in common only &c. And. 42. pl. 107. Rider v. Williamfon.

[ 236 ] 15. Thirteen men join'd in a purchase of a manor, the conveyance was of a moiety to one of them in fee, and the other moiety to the other twelve in fee; the twelve made a feoffment to J. S. of twelve several tenements, and land, and J. S. made twelve several feoffments to those twelve; now the thirteenth man, who had the other moiety, brought one writ of partition against them all, pretending that they held infimul & pro indiviso; and by the opinion of the whole Court it would not lie, but he ought to have brought several writs. Browhl. 157. Anon.

16. Writ of partition lies only against tenant of the freehold; for 'tis a real action, and the statute gives a temporal partition against tenant for life, and after there ought to be another against remainderman. Litt. R. 300. Mich. 5 Car. B. R. Cole v. Aylott and Stevens.

(T) Writ. *At what Time Writ lies. After abatement of a former Writ &c.*

1. **WHERE** part of the partition is recovered against the one of the parceners, new partition shall be made. Br. Partition, pl. 22. cites 42 Aff. 22.

2. Two jointtenants for years; one suffer'd a stranger to occupy his moiety with him; the other brought a writ of partition against his companion and the stranger, supposing that his companion had granted a moiety of his part to the stranger; the stranger shew'd that he was but tenant at will to the companion,

panion, and so the writ abated. Resolved that he might have another writ by journey's accounts against his companion, the possession of the stranger being good colour for bringing the writ of partition, and he could not take notice what estate the stranger had &c. Cro. J. 218. Hill. 6 Jac. B. R. Beedle v. Clerke.

3. The Court will not allow two writs of partition to be brought, viz. a second by the defendant against the plaintiff, where there is one pending in Court by the plaintiff against the defendant, because the defendant may have the same remedy on the first writ as he can on the second. G. Hist. of C. B. 209. Butsee (Y) pl. 9.

(U) Judgment. Of the several judgments, and in what Cases Error lies, and when. See (O) R. pl. 3. 3.

1. Partition made between parties after an erroneous judgment is no bar nor estoppel in writ of error brought to reverse it; quod nota. Br. Partition, pl. 12. cites 19 H. 6. 25.

2. When judgment shall be given upon this writ, the judgment shall be thus. That the partition shall be made between the parties, and that the sheriff in his proper person shall go to the lands and tenements &c. and that he by the oath of twelve lawful men of his bailiwick &c. shall make partition between the parties, and that one part of the lands and tenements shall be assigned to the plaintiff, or to one of the plaintiffs, and another part to another parcener &c. not making mention in the judgment of the eldest sister more than of the youngest. Co. Litt. f. 248. 48 & 9 W. 3. cap. 31. f. 4. enacts, That when the high-sheriff by reason of distance, infirmity or other hindrance, cannot conveniently be

present at the execution of any judgment in partition, the under-sheriff, in presence of two justices of peace, may proceed to execution by inquisition; and the high-sheriff thereupon shall make the same return as if he were personally present; and the tenants of the lands shall be tenants for such parts set out severally to the respective owners, under the same rents and reservations; and the owners of the several parts shall make good unto their respective tenants the said parts severally, as they were bound to do before partition made.

5. The sheriffs, their under-sheriffs and deputies, and in case of disability in the high-sheriff, all justices of peace, shall give due attendance to the executing such writ of partition, (unless reasonable cause be shewn to the Court upon oath) or otherwise be liable to pay unto the demandant such costs and damages as shall be awarded by the Court, not exceeding 1l. for which the demandant may bring his action in any of his Majesty's Courts at Westminster; and in case the demandant doth not agree to pay unto the sheriff or under-sheriffs, justices and jurors, such fees as they shall demand, the Court shall award what each person shall receive, having respect to the distance from their habitations, for which they may severally bring their actions. [ 237 ]

8. 6. This act shall continue seven years &c. This act is made perpetual by 3 & 4 Ann. cap. 18.

3. Note, the first judgment in a writ of partition is, *Quod partitio fiat inter partes prædictas de tenementis prædictis cum pertinentiis*; Co. Litt. 167. b.

4. There be two judgments in a writ of partition; of the former is spoke to above: and when partition is made by the oath of twelve men, and assignment and allotment thereof, and so returned by the sheriff, then the latter judgment is, *Ideo consideratum*. 2 Bull. 114. Trin. 11 Jac. Rawlins v. Barret. — Cro. E. 635. Mich. 40 & 41 Eliz.

B. R. Lord Berkley v. Warwick. *consideratum est quod partitio predicta firma & stabilis in perpetuum teneatur*; and this is the principal judgment. Co. Litt. 168. a. — 11 Rep. 38. Mich. 12 Jac. in Metcalf's Case. — Sty. 290. Trin. 1651. Spittlehouse v. Farnery, S. P.

5. If partition be made by the sheriff, tho' the writ be not returned, yet 'tis good enough, and none of the parties shall except against it. Per Dyer. Owen 31. Pasch. 6 Eliz. Anon. — A writ of error lies on the first judgment before return of the writ. Brownl. 157. Cocks v. Combstocks.

C. L. 168. 6. A writ of partition was brought, and judgment *quod partitio fiat*; and before it was executed in the country by the sheriff, error was brought; and it was said by the Court, that it does not lie upon such a judgment before the partition be made and returned by the sheriff. And judgment was given *quod partitio stabilis remaneat*; for 'tis not like to other real actions, where error lies before the *habere fac. seisinam* be return'd; for that is a final judgment, and no other to be given. Also there needs no return of an *habere fac. seisinam*; for the party that recovers may execute his judgment by his entry, as Dyer 67. a. Noy 71. Countess of Warwick v. Lord Berkley.

given *quod partitio stabilis fiat*, the record is not full, nor the judgment perfect, and therefore the record should not be remov'd — Award *quod partitio fiat* is only an award of the Court, and interlocutory only, and not definitive; and till the last judgment the parties have day by the roll, which proves that the principal plea remains undetermined. 11 Rep. 40. a. in METCALF'S CASE, and cites the Case of Lady Warwick v. Lord Berkley — 2 Roll. R. 85. Mich. 12 Jac. B. R. in the Case of Wood v. Medcalfe, it was said by Coke Ch. J. there was not any resolution, but that it seem'd in such case that before the second judgment no writ of error lay; *quod fuit concessum per Doderidge*; but Croke and Haughton doubted of it.

7. A. brings partition; and thereby demands the fourth part &c. if the jury find that they hold *pro indiviso*, but that A. ought to have only a fifth part &c. A. shall not have that which is due to him [viz. the fifth part, which he has a right to]; for then the judgment will be variant from the demand. Noy 107. Becket v. Bromley.

8. Several judgments are to be given, *as the case is*, upon the several statutes; for the judgment upon the first statute of 31 H. 8. of inheritances is, *Sit firma partitio in perpetuum*; but upon the statute of 32 H. 8. 'tis not so; for judgment given upon that statute shall not bind him in the reversion; for there is a proviso in the statute in the end of it, that partition made by force of that statute shall not be prejudicial or hurtful to any persons other than such who be parties to the said partition, their executors or assigns. Per Gawdy J. Goulb. 86. pl. 97. Mich. 28. & 29 Eliz. B. R. Stransam v. Colburn.

S. C. Sid. 369. where it is said that judgment was [238] reversed. 2 Keb. 413. S. C. adjor. 9. On a writ of error to reverse a judgment in a writ of partition, the errors assigned were, 1. For that the executory judgment was, *quod partitio fiat*. instead of, *sit or fiat*. 2. The precept thereon to the sheriff, *quod per sacramentum proborum hominum in comitatu &c.* and not said *de comitatu*. 3. There was no continuance for the tenant by *idem dies*, when the partition was to be made. 4. No mention was made of the view of frankpledge

frankpledge mentioned in the writ as not appurtenant to the manors, but distinct and so cum pertinentiis does not supply it. 5. Then the sheriff returned *unam medietatem eorundem* (viz. the premises) to be delivered to the plaintiff, viz. such manors *per parcella medietatis sue*, and other manors to the defendant, and then again *alteram medietatem* to the plaintiff, and so he had two moieties. 6. The sheriff delivered *quartam partem* of &c. and did not say *metas & bundas*. 7. The sheriff divided the rents without shewing which viz. copy or free, or upon leases for life, years, or at will. 8. The return did not conclude that *the* were all the lands comprehended in the writ, as it is in Co. Ent. 412. a. pl. 2. 9. The demand was of 400 acres of wood, and no mention thereof in the partition, but only of a park *una cum omnibus arboribus eidem pertinent*. which was not the wood here. 10. Diverse things were delivered in the partition not demanded or mentioned in the writ, and of which writ of partition lies, viz. pasture for six beasts, shops &c. 11. The delivery is of 3 acres of meadow lying in &c. *excepting duobus rodīs* and no disposal of those two rods before or after. Lastly, The writ was that the sheriff should go to the advowson, which could not be, it being incorporeal. Et adjournatur. Raym. 172. Mich. 20 Car. 2. B. R. Danby v. Palmes.

natur. But Ibid. 580. says, the parties agreed for want of an idem dies, and other exceptions unanswerable that the judgment be reversed; and so it was.

(W) Jury. What the Jury must do where the Lands to be divided were not certainly known.

1. A. One tenant in common of a manor purchases in a freehold which was so intermixt with the demesnes, that it could not be distinguished by the jury. A. ought to inform the jury of the bounds, but if no one informs the jury, and they do as well as they can, and make partition according to the best of their judgment, they do their duty; for they are compellable to make partition at their peril. D. 265. b. Mich. 9 & 10 Eliz. Temple v. Cook and Wotton.

(X) Sheriff. What he must do after Partition made.

1. OF the partition which the sheriff has made, he shall give notice to the justices under his seal, and the seals of every of the 12 &c. Co. Litt. f. 249.

It must be so return'd for the words of the judicial writ

of partition which commands the sheriff to make partition are, *Assumptis tecum 12 &c.* (so as there must be 12) & *partitionem inde &c. sciare facias iusticiariis &c. sub sigillo tuo & sigillis eorum per quorum sacramentum partitionem illam feceris &c.* And this is the reason wherefore in this case the partition which they make upon oath ought to be returned under their seals; and the reason for that is for the more strengthening of the partition by the 12; and that the sheriff should not return what partition he would. Co. Litt. 168. b. 169.

2. If partition be made by the sheriff, altho' the writ be not returned, it is good enough, and none of the parties shall except

except against it ; per Dyer. Ow. 31. and so he said was the better opinion in the Case of Culpepper v. Naval.

See (R).

\* (Y) *Pleadings, and what shall be recovered.*

In a partic'  
faciend' by  
A. against  
B. who  
pleaded that

1. **I** F one coparcener leases her part to another for years, yet she shall have a writ of partition against her sister during the term of years. F. N. B. 62. (G) cites 22 E. 3. 57. (17).  
the plaintiff had leased to him his purparty for five years, and that *saving to him his said term, he is ready to make partition*, and always has so been, and his protest was entered on the roll, Skipw. to have damages, replied, that he had not been always ready, et non allocatur ; for altho' he counts ad damnum, yet no damages shall be recovered, and therefore a partition was awarded with the saving of the term ; and per Caudith. the like law is in a nuper obit, account, perambulatione facienda. But per Strange and Martin, the plaintiff shall recover damages. F. N. B. 62. (G) in the notes there (2).

2. Where the avowry is *for rent reserved upon equality of partition* upon partition made between two parceners, it is a good plea that they were three parceners, and the third at the time of the partition was out of the country, and came back within age, and re-enter'd, and the other said, that the third after released her estate *absque hoc*, that she enter'd ; Prist, and others c contra. Br. Avowry, pl. 68. cites 24 E. 3. 51. 58.

3. Entry in nature of assise ; per Danby, if the tenant says that *J. N. was seised, and leased to him for life, and died seised of the reversion, and of other lands, and has issue two daughters, and that they made partition, so that the reversion was allotted to the one in allowance of the other lands allotted to the other*, this is good pleading without shewing what the other lands are. Br. Partition, pl. 3. cites 28 H. 6. 2. and book of entries.

4. Partitione facienda, and counted that they held the carve of land in common by descent of inheritance, and shewed how &c. Boef said, their common ancestor in his life infeoffed A. whose estate he has, *absque hoc*, that he held in common with the plaintiff by descent of inheritance, prout &c. And a good plea per Cur. by which the plaintiff said, that they held the said land in common by descent of inheritance *ut supra* ; and this was held a good issue, but he would have said, that they held in common in the manner &c. And Prifot said, that he shall say that he held in common by descent ; quod nota. Br. Partition, pl. 15. cites 39 H. 6. 19.

5. In partition the defendant said, that he was sole seised, *absque hoc*, that he held *pro indiviso*, and a good plea ; per Brian Ch. J. for he has traversed the point, and the supposal of the writ ; but contrary per Vavisor, and the Reporter ; for the entry and seisin of the one parcener is the entry and seisin of the other. Br. Partition, pl. 26. cites 4 H. 7. 9r

6. In writ of partition of several manors, the defendants appeared, and confessed the action, and judgment thereupon, quod *partitio fiat*, and writ awarded to the sheriff to make partition, pending

ing which writ unserved, inasmuch as *the return of the partition was vitious, another writ was awarded, and before execution one of the defendants brought a new writ against the plaintiff and the other defendant of one of the said manors, who pleaded all this matter in bar.* The Reporter makes a question, if the plea was good, or that they should have pleaded it by way of *estoppel*, to say that they contradicted the partition made, where it appears by the first record that they were always ready when they confessed the action; or whether they should plead all the matter aforesaid, and conclude *if pendente dicto breve priore de partitione facier. da & nondum rite execut. to this writ the plaintiff may be answered?* And he cites Pasch. 22 E. 3. That quare impedit was brought by A. against B. and B. brought a quare impedit against A. of one and the same church returnable at one and the same day; and the Court would not suffer both to stand, but made one to be discontinued. D. 92. b. pl. 21, 22. Mich. 1 Mar. West v. Moyle & al.

7. In writ against two, one appeared, and granted the partition, and the other made default. Dier said, that writ of partition shall issue to the sheriff, but *cessabit executio* till the other comes; for partition by writ cannot but be against all; contra of partition by agreement. Dal. 28. pl. 12. 2 Eliz. Anon.

8. The writ upon the statute 31 H. 8. was general, that they did hold *infirmul & pro indiviso manerium de D. & terras & visum franci plegii in D. and that the defendant denied partition, contra formam statuti &c.* The defendant pleaded *quod non tenuit infirmul prout &c.* The Jury found that the plaintiff held one moiety in fee, and that the defendant was tenant in tail, remainder to his right heirs of the other moiety. It was objected, that this writ was not good, but it should have been a writ specially founded according to the case; for so the statute appoints, and that it be fram'd by the Clerks of the Chancery; and of that opinion was Anderson: but all the other Justices held the writ good; for the statute prescribes no form, but leaves it to the clerks, who devised it upon this statute generally, adding only the words (contra formam statuti) which shews it grounded on the statute. And the usual practice hath been since the statute to allow such writs between jointenants and tenants in common of an inheritance; but a writ founded upon 32 H. 8. between jointenants and tenants in common of a particular estate ought to be special, shewing their particular estates; and ruled that the writ was good. Cro. E. 759- Pasch. 42 Eliz. C. B. Moor and Brown v. Onslow.

It was objected, that the declaration supposed a joint-holding in fee, whereas the verdict found that defendant held in tail, and that so the estate was mistaken; and the Court held this to be ill; for tho' the one needed not to take notice of the other's estate, yet when he will take upon him the know-

ledge of it, and mistakes it, he fails, and his writ shall abate. But the parties compounded. Ibid.—So where the one estate was in fee, and the other estate was for life, a general writ against the defendant as jointenant was held good by reason of the precedents, without framing it specially upon the statute: 2 H. 8. Cro. E. 742, 743. Hill. 42 Eliz. C. B. Tayler v. Sayer.—And 2 Lutw. 108. Hill. 1 & 2 Jac. 2. Hicks v. WITSHILL, such general writ was held good, being brought by tenant in fee of the one moiety, against tenant for life of the other moiety.—In a writ of partition between tenants in common title need not be shewn; and so was the opinion of the whole Court, and said, they would not reverse a judgment contrary to so many precedents. Cro. E. 64, 65. Mich. 29 & 30 Eliz. B. R. Yates & al. v. Windnam.—3 Le. 231. S. C.

S. P. Brownl.  
156. Anon.

9. It is no plea that the *defendant had brought a writ of partition of the same land.* Brownl. 158. Mill v. Glemham.— See (T) pl. 3. Contra.

If there are  
but 3 parts,  
and two are  
demanded,  
there it is

10. Writ was of *two parts*, without saying in *three parts to be divided.* The opinion of the Court was, that it was good. 2 Brownl. 275. Mich. 7 Jac. C. B. Bailly v. Clare.

good, without saying in three parts to be divided; for when parts are demanded it is intended all the parts but one, and that only one remains. Ibid. cites 17 E. 3. 44. 19 E. 7. Brief 244; 17 Aff. And the Register fol. 16. 12 Aff. And says, it was adjudged in B. R. in one JORDAN'S CASE, that demand of two parts, where there are but three parts, is good.—And also cites 39 H. 6. SALFORD v. HURLSTON in formedon, which demanded two parts where there were but three, and so of *three parts where there were but four*, and that it was good without saying (in three or four parts to be divided.) 2 Brownl. 275. in Case of Bayly v. Clare.

11. No *damages* shall be recovered in a writ of partition, nor an inquiry for them, and yet the writ and the count is ad damnum, per Cur. Noy. 68. Countess of Warwick v. Ld Berkley.

12. In a writ of partition betwixt tenants in common by the statute of 31 H. 8. cap. 1. the tenant *pleaded ancient demesne*, and adjudg'd a good plea. Raym. 249. Hill. 30. and 31 Car. 2. C. B. Pont v. Pont.

## [ 241 ] (Z) Equity. Decreed in Equity, and How.

1. **WHERE** the *tenant of the King held land of the King, and had an advowson, and had three daughters and died, the partition may well be made in Chancery during the possession of the King; and there partition was made so, that one alone had the advowson in allowance of other lands; and after the parceners made partition so that each should present by turn; and because it was without licence of the King, therefore it was void against the King.* And per R. Thorp, *if the partition in Chancery is not equal, she who is grieved shall have scire facias to bring in again all the coparceners into Chancery, and there to make partition de novo, and not otherwise.* Br. Partition, pl. 10. cites 21 E. 3. 31.

2. Partition made in Chancery, *rendring rent*, is good, and may be sent into C. B. and execution may be made thereof there by scire facias, and well. Br. Jurisdiction, pl. 114. cites 29 Aff. 23 & 37 H. 6. accordingly.

S. P. Ibid.  
221. cites  
22 Eliz. li.  
A. fol. 404.

3. An *unequal* partition relieved in equity. Toth. 220. cites Mich. 1594. Long v. Miller.

Nourse v. Ludlow.

4. The Court would not grant a partition, the *matter being but nine pounds.* Toth. 221. Mich. 14 Car. Babb v. Dudeney.

\* Hob. 179.  
Points v.  
G. bbons.

5. Partition was decreed notwithstanding *feme covert* and *infants*, and some *incumbrances* were in this case concerned. Chan. Rep. 235. 14 Car. 2. Martyn v. Perryman.

6. *A. seised of three fourths of a farm, and B. seised of the other fourth,*

*fourth*, lets her parts to the defendant for life, or years determinable on lives, and he took the profits of all; a division is decreed to be made by commissioners *during the defendant's term* and titles. 3 Ch. R. 29. Mich. 21 Car. 2. Pyne v. Matthew.

7. A partition between tenants in common of a *great waste* was decreed, tho' many reasons tending to great inconveniences, viz. want of pasture, shade &c. 2 Chau. Cases 237. Mich. 29 Car. 2. Manaton v. Squire.

8. *Bill* lies for partition, and this is *grounded on the statute*, which makes one tenant in common accountable to another; so that now since the statute, they are become as it were trustees for one another. Arg. Vern. 421. in Case of Earl of Kildare v. Sir Maurice Eustace.

9. Two thirds of an *estate, consisting of a great house, park, and farms of 1000 l.* a year belong'd to A. and one third to B. who insisted to have a third part of the house and park. But Ld. Ch. Parker held, that tho' B. must have a third part in value of the estate, yet there was no colour of reason that any part of the estate should be lessened in value, in order to his having a third part of it, but if B. should have one third of the house and park, it would much lessen the value of both; and recommended it that the seat and park be allowed to A. she having two thirds, and that a liberal allowance out of the rest of the estate be made to B. in lieu of his share of the house and park. Wms's Rep. 446. Trin. 1718. Earl of Clarendon and Bligh v. Hornby.

10. *A. devised lands to trustees and their heirs, viz. as to one moiety to B. an infant in tail, and the other moiety to C. (of age.) but whether an estate tail, or for life only, was doubted by reason of the wording the limitation.* B. brought a bill for a partition; and that the trustees convey the legal estate of the separate moiety to be allotted to him, to him and the heirs of his body, there being no doubt of his being intitled to an estate tail. Lord C. King decreed a partition, and directed a commission to allot several moieties to B. and C. to hold according to their several estates under the will, and to be respectively quieted in the possession; but because B. cannot join in conveying the moiety to C. because of infancy, and so there cannot be mutual conveyances, the conveyances of the trustees were respited until B. should be 21, or the Court give further order. 2 Wms's Rep. 518. Hill. 1728. Ld. Brook v. Lord and Lady Hertford.

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[ For more of Partition in general, see *Manors, Partes, &c.*, and other proper Titles.]

## Partners.

## (A) How liable to Creditors.

1. IF there are two partners and *one breaks*, you shall not charge the other with the whole, because 'tis *ex maleficio*; but if there are two partners, and one of them *dies*, the survivor shall be charged for the whole. Per Twissden J. Mod. 45. Hill. 21 and 22 Car. 2. Anon.

2. Two entred into articles of copartnership.—Each brought in 1000l. stock. There was to be no benefit of survivorship, neither was to become indebted without the other, nor either to take out of the stock without the other. One became indebted without consent of his partner, and made his wife executrix and dy'd. The wife confessed judgment for the debt. The other sues for account and relief against the creditor and the wife. They confess the articles, and obtaining the judgment, Lord Chancellor granted an *injunction* against the judgment, because the debt related not to the partnership, saying, if this be suffered, no trade could be in such case. 2 Chan. Cases. Trin. 32 Car. 2. 38. Anon.

On a joint commission of bankruptcy against two traders separate creditors are allowed to come in, but the joint effects are

3. Joint debts are to be paid out of the joint stock first, and if there be an overplus, then that ought to be apply'd to pay particular debts of each partner: but if there be not enough to pay all the joint debts, and if either of the partners shall pay more than a moiety of the joint debts, then such partner is to come in before the commissioners of *bankrupts*, and be admitted as a creditor for what he shall so pay over and above his moiety. 2 Chan. Rep. 226. 34 Car. 2. E. Craven & al. v. Knight & al.

to be apply'd first to pay the partnership debts, and then the separate debts; and the separate effects to pay first the separate creditors, and afterwards the partnership creditors. Per Cowper C. 3 Vern. 706. Mich. 1715. Crowder's Case. — Wms's Rep. 326. S. P. per Lord Cowper. — S. P. 2 Wms's Rep. 500. by Lord C. King. Mich. 1728. Ex parte Cook.

A quere is added, how the separate creditors could have other title than those under whom they claim? Ibid.

4. Two partners in trade put in each an equal stock, and agreed by covenant, that the stock should pay the debts of the stock, and neither of their separate debts should charge the stock, but only his own estate, or to that effect. They both became bankrupts, and a commission against them both; one of them owed separately more than the other. The question was between the separate creditors of each bankrupt, and the creditors on account of the joint stock; for these would exclude the separate creditors from charging the joint stock, but that it should satisfy the stock debts. But the

Ld.

Ld. North was of a contrary opinion; for the covenant of the partners cannot bind any of their creditors; but only themselves. 2 Chan. Cases 139. Pasch. 35 Car. 2. 27. Apr. 1682. Ld. Craven v. Widdows.

5. A. B. and C. were copartners of goods of great value. [ 243 ] B. being indebted to J. S. a *fiery facias* was su'd against B. and thereupon all these goods were seized. It was held by Holt Ch. J. That tho' A. B. and C. had joint and undivided interests, yet only the share or part of B. and no more could be seized upon the execution against B.'s goods. Show. 173, 174. Mich. 2 W. & M. Bachurst v. Clipkard.

The Reporter ibid. says, This point was resolved in Court the day before, by Holt Ch. J. in his argument,

in the Case of *ETKINS v. WESTERNE*, and not denied by any of the Judges. And says, that he saw Ld. Ch. J. Pollexfen's opinion under his hand upon this occasion, that on an execution against one partner's goods, only his share or part is liable.

6. If there are two partners, and execution is sued against one, the sheriff must seize all the goods and sell an undivided moiety, and the vendee will be tenant in common with the other partner. 1 Salk. 392. Mich. 5 W. & M. B. R. Heydon v. Heydon.

Comb. 217. S. P.—If one or more of the joint traders become bankrupt, his or

their proportions only are assignable by the commissioners, to be held in common with the rest who were not bankrupts. At Nisi Prius coram Holt Ch. J. 12 Mod. 446. Pasch. 13 W. 3. Anon.

7. Where there are several partners, and a man goes upon the credit of all, the act of one is evidence against the rest, unless they shew a disclaimer. Coram Holt Ch. J. at Nisi Prius. 1 Salk. 292. . . . v. Layfield.

8. A. and B. are partners.—A. borrows money and gives his note subscribed for self and comp. There was no proof that the money was brought into stock, but the money was paid in the shop. Per Cur. the note of one partner (the money being paid in the shop) binds both, and tho' at law the note stands good only against the executor of the surviving partner who was A. who received the money and sign'd the note, yet it is proper in equity to follow the estate of B. for satisfaction; and decreed accordingly. 2 Vern. 292. Trin. 1693. Lane v. Williams.

This Case after a dismission by the Master of the Rolls, was heard on appeal, Mich. 1692. when no notice is taken of any mention to have been

made of the circumstance of the money's being paid in the shop, and yet then the Court declared they took it that both partners were bound. See 2 Vern. 277. S. C.

Acceptance of a bill by one partner binds both if it concerns the joint trade. 1 Salk. 126. Hill. 8 W. 3. B. R. Pinkney v. Hall.—And an action lies against the other. Arg. Sti. 370. Pasch. 1693. Anon.

9. A. and B. are partners dry-salters.—A. embezzles the joint stock, contracts private debts, and becomes bankrupt. Commissioners assign the goods in partnership. Bill by B. for an account, and to have the goods sold for the most profit. It was insisted that thereout debts in partnership should be first paid, and that then satisfaction should be made out of A.'s share for what he had embezzled, and that the \* assignees could be in no better condition than the bankrupt himself; and the Court seem'd to be of that opinion. 2 Vern. 293. Trin. 1693. Richardson v. Goodwin.

\* Assignees can have only such action as bankrupt might.—2 Show. 103. Rufworth v. Hode.

But if in that case one had rather deal with one of them upon his own account, he

must make his agreement specially, in which case the debt will be only his and his executors, and shall not survive. At Nisi Prius coram Holt Ch. J. 12 Mod. 446. Anon.

10. If there be several joint partners, and J. S. has *dealing generally with one of them in matters concerning their joint trade*, whereby debt is due to him, it shall charge them jointly, and the survivors of them. At Nisi Prius coram Holt Ch. J. 12 Mod. 446. Pasch. 13 W. 3. Anon.

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11. A. and B. goldsmiths and partners were bound to J. S. in a bond for payment of 1000 l. and interest in 1693. Afterwards in the same year they dissolved the partnership, when A. by money and bond secured to B. his share of the stock, and took on himself the partnership debts. Public notice was given to creditors of the joint stock to receive their money, or to look on A. only as their paymaster. B. died. J. S. in 1708, called in his money from A. but continued the money on A.'s subscribing the bond at 6 l. per cent. A. was solvent till 1711, and till then J. S. might have had his money when he pleased; but then A. became bankrupt. Ld. C. Parker held, that the executor of B. was still liable; that the notice was *res inter alios acta*, and could not bind J. S. and that changing the interest did not alter the security; for still it was the bond of both, but B's executor could not be liable to more than 5 l. per cent. for the arrears of interest; and J. S. was decreed his debt and costs. Wms's Rep. 682. Mich. 1720. Heath v. Percival.

12. Three persons enter'd into partnership in the trade of sugar-boiling, and agreed that no sugar shall be bought without the consent of the majority; one of them after makes a protest that he would no longer be concerned in the partnership with them. The two other persons after make a contract for sugars, the seller having notice that the third had disclaimed the partnership; he shall not be charged. MS. Tab. 14 June 1721. Minnitt v. Whitney.

13. If a joint commission of bankruptcy issues out against 2 joint traders, it was questioned, if separate creditors may come in under it? And that they may it was argued, that if there are 2 joint traders, and one becomes bankrupt one day, and the other the next day, and a joint commission is taken out, different relations must be had under the joint commission with regard to the different times of the bankruptcy, and the distribution under it must be the same as if separate commissions had been taken out. For in both cases the joint fund is primarily apply'd to the joint debts, and the separate fund to the separate debts, and then in an average to the joint debts & vice versa. So are the orders of the Court of Chancery in the following instances. A. and B. were partners, but the partnership being dissolved, and A. setting up for himself became bankrupt, and a commission issu'd against him, and then B. failed and a commission issu'd against him, the joint creditors were admitted to prove their joint debts under the separate commissions, and cited 22 January 1728, the Case of STEPHENS v. BROWN

BROWN and ADLAMS, and that 22 April 1729, it was ordered, that the joint estate should go to the joint creditors, and the remaining part of the joint estate, which respectively belonged to each, should go to their *separate creditors* upon a *joint commission* sh'd out against the then defendants, and cited HORSEY v. HEYHAM AND HEYHAM, and that 2 Geo. 2. in C. B. two being joint obligors, and after bankrupts, separate commissions were taken out against them, and the separate commissioners refusing to let in the obligee, he brought an action against one of the obligors, but the defendant having got a certificate under the separate commission was discharged, MATHEWS v. ALAND; which proves that joint creditors may come in under separate commissions, and by the same reason separate creditors may come in under a joint commission, and the law being so, *every assignee may recover* by setting forth the special matter; and besides, if the *assignee of the other part will not join*, he may be summoned and seivered. And the Court thought the last case cited came fully to the point of the principal case, and therefore inclin'd to give judgment accordingly. Sed adjournatur. Gibb, 282. Grace v. Heyham.

### (B) *Disputes between the Partners and their Debtors.*

1. ONE *joint factor may* with the express consent of his companion *account without him* by the law of merchants; for factors are often dispersed so as they cannot be both present at their accompts; admitted 13 Eliz. in Scacc. 2 Le. 76. in Case of Goore & al. v. Dawbeney.

2. The *sale* by one partner is the sale by both, and therefore tho' one sells the goods or merchandizeth with them, yet *action* must be brought *in both their names*, and in such case the defendant shall not be received to wage his law, that the other partner did not sell the goods to him as is supposed in the declaration. Godb. 244. Hill. 11 Jac. C. B. Lambert's Case.

3. If 2 be found in *arrearages of account* by the custom of [ 245 ] merchants, one may be charged to pay all the debt as well as both; per Roll Ch. J. Sti. 243. Hill. 1650. in Case of Child v. Guiatt.

4. If there are *accounts* between 2 merchants, and *one becomes bankrupt*, the Court is not to make the other, who perhaps upon stating the accounts is found indebted to the bankrupt, to pay the whole that originally was intrusted to him, and to put him for recovery of what the bankrupt owes him, into the same condition with the rest of the creditors, but to make him pay that only, which appears due to the bankrupt on the foot of the account. Otherwise it will be for accounts between them after the time of the other's becoming bankrupt, if any such were; per North Ch. J. Mod. 215. Trin. 28 Car. 2. C. B. Anon.

5. A.

5. A. and B. were *joint farmers of the excise*; J. S. laid out money on their behalf. A. died. J. S. brought an action against B. and counted of money laid out to the use of the defendant. The defendant pleaded non-assumpsit. The whole Court were of opinion, that the action would not lie. For 2 partners being concerned the action will not lie against one alone. The plaintiff ought to have set forth the death of the other. But if judgment be had against one, the goods in partnership may be taken in execution. 2 Mod. 279. Mich. 29 Car. 2. C. B. Tiffard v. Warcup.

6. If there be several joint traders, *payment to one of them is payment to all*. At Nisi Prius coram Holt Ch. J. 12 Mod. 447. Pasch. 13 W. 3. Anon.

7. *So, if they all, except him to whom the payment was made, were bankrupts*, the payment is only unavoidable as to his proportion. At Nisi Prius coram Holt Ch. J. 12 Mod. 447. Anon.

8. *And if there be four partners, whereof three are bankrupts, and their shares assign'd, and a payment is made to him that was no bankrupt, it is a payment to all the assignees; for now they are all partners*. At Nisi Prius coram Holt Ch. J. 12 Mod. 447. Anon.

(C) *One dies. Disputes between the Executor or Administrator of the deceased, and the Survivor &c.*

1. *Administrator to one partner sueth the copartner for an account of the intestate's share, which this Court accordingly decreed*. Chan. Rep. 261. 17 Car. 2. Heyne v. Middlemore.—2 Chan. Cases 129. Mich. 34 Car. 2. Anaud v. Honiwood.

The Case was thus, viz. A. and B. were partners in making of bricks for J. S.—A.

died, leaving M. his executrix; B. promised M. in consideration of her promising to relinquish her interest in the partnership, that he would pay her so much money as she had been out about the bricks; M. brought assumpsit against B. and had a verdict; but it was mov'd in arrest of judgment, that here was no consideration, for that M. had no interest in the partnership, which being joint, must survive to J. S. and that she ought to have shewn how she relinquish'd her interest. But the Court held it a good consideration; for it might be that there were covenants, that no survivorship should be, (and after a verdict the Court will intend that there were) which tho' they do not sever the joint-interest in law, yet they give remedy in equity, which to debar herself of, is a good consideration, and being laid by way of reciprocal promise, there needs no averment of performance. Vent. 40. 41. Trin. 21 Car. 2. B. R. Wells v. Wells.

3. *Surviving joint-merchant, and the executor of the deceased join'd in assumpsit, and held good*. 2 Lev. 228. Trin. 30 Car. 2. B. R. Hall &c. v. Hufham.

4. An

4. An account of partnership in trade shall not be *inspected after the last balance*, and must not be carried on after the death of a partner, and from that time to be accounted as his separate estate; and for such debts as concern the partnership, the plaintiffs the executors of the deceased partner shall be allowed their proportion of the benefit of *compositions* made by the defendant with his creditors for them, and where *abuses to the books of account* were charg'd, 'twas ordered that defendant be examined on *interrogatories* relating thereto. Hill. 27 Car. 2. Fin. R. 191. Beake v. Beake.

5. *Surviving partner* trading on his own account with the debtors to the partnership, it was ordered that an attorney be appointed to sue for the debts, unless the surviving partner would *give security* to answer moiety of the debts to the administratrix of the deceased partner. Hill. 1682. Vern. 118. Estwick v. Coningsby.

6. Two persons had *mutual dealings*, but before their accounts settled one of them dies, and the survivor brought a bill against his executors to have an account, and that the plaintiff might discount, what he was to pay, out of what the executors were to pay him; and it was decreed accordingly, altho' it was objected it might make a devastavit in the executors. Mich. 1701. Abr. Equ. Cases 8. Beaumont v. Grover.

7. If there are two joint-traders, and one dies, and the *survivor carries on the trade* after the death of the partner, he *shall answer for the gain* made by this trade. Per Lord Harcourt. Wms's Rep. 141. Pasch. 1711. in Case of Brown v. Litton.

### (D) One dies. Disputes between Creditors and the Survivor &c.

1. *Assumpsit* for 100l. for goods sold by the plaintiff and B. whom plaintiff surviv'd; defendant pleads in *abatement*, that the plaintiff and B. were *joint-merchants*, and that by the law merchant there is no survivor between them, and that B. made J. S. executor, who administr'd, and is now alive, and not party to the suit; and resolved upon demurrer upon consideration of Co. Litt. 172, 182. and F. N. B. 172 (E) that the bill shall abate. 2 Lev. 188. Hill. 28 & 29 Car. 2. B. R. Hall v. Huffam.

The survivor, and the executor of the deceased joint-merchant join'd in action, and counted that upon the law merchant there is no survivor,

and that the survivor and the deceased sold to the defendant &c. Judgment for the plaintiff. 2 Lev. 2:8. Trin. 30 Car. 2. B. R. Hall v. Huffam.—S. C. held accordingly. Freeman's Rep. 468.—3 Keb. 798. Trin. 29 Car. 2. S. C. reports, that the Court inclined the action survives, and that upon recovery by the survivor, the executors of the deceased shall come in, but cannot join. Hall v. Rougham.—In trover the defendant pleaded, that the plaintiff and A. and B. were joint-merchants, and were possessed of the goods as merchants, and that by the law of the land there is no survivorship between joint-merchant, and concluded in bar. It was argu'd upon demurrer, that the action was well brought by the survivor alone, because the *action must necessarily survive, tho' the interest does not*; otherwise there would be a failure of justice, because the executor of the deceased and the survivor cannot join; for their rights are of several natures, and there must be several judgments; besides, 'tis clear this is not a plea in bar as it is pleaded here; and of that opinion was the whole

whole Court, and so the principal point, viz. the gift of the action was not adjudged. Carth. 176; 171. Hill. 2 & 3; W. & M. B. R. Kemp v. Andrews. — S. C. argued, and the Case in 3 Keb. 798. was cited; and per Cur. this can never be a good bar; so that they did not consider whether the executors must or can join; and gave judgment for the plaintiff. — 3 Lev. 290. S. C. adjudged for the plaintiff; for this at the most is only a plea in abatement, and defendant pleaded it in bar. — But this point of the executor and the survivor's joining or not, was determined Pasch. 10 W. 3. B. R. in the negative, viz. two joint-merchants made B. their factor; one died leaving an executor; it was held that the survivor and executor *cannot join*; for the remedy survives, but not the duty, and therefore upon recovery he must be accountable to the executor for that. 2 Salk. 444. Martin v. Crump:

[ 247 ] 2. If there are two partners in trade, and one buys goods for both, and the other dies, the survivor may be charged by indebtedness *assumpsit* generally, without taking notice of the partnership, or that the other is dead, and he survived. Per Holt Ch. J. Comb. 383. Trin. 8 W. 3. B. R. Hyatt v. Hare.

\* Winch.  
52. Arg. —  
2 Salk. 444.  
S. C.  
3. Tho' there is no *\* survivorship* among merchants, yet if two joint-merchants contract with a bailiff, the contract is in-tire and joint, and by the death of the one survives to the other. Now suppose a *factor* should bring his action for his wages, it must be with the survivor only. Per Holt Ch. J. Comb. 474. Pasch. 10 W. 3. B. R. Martin v. Crump.

### (E) *Inter se.*

1. IF there be two joint-merchants, one of them naming himself a merchant shall have an account against the other, naming him a merchant, and shall charge him as *receptor denariorum ipsius B. ex quacunque causa & contractu ad communem utilitatem ipsorum A. & B. provenient. sicut per legem mercatoriam rationabiliter monstrare poterit.* Molloy 457. cites 10 H. 7. 16. a. out of Co. Litt. 172. Lib. Intrat. 17. 18. 19.

2. A. and B. partners in trade stated their account, and A. gave B. a note for the balance, but at the same time B. promised to rectify any error or mistake in the account; B. gets judgment against A. on the note at law; decreed a new account concerning their stock and trade, and payments and receipts, and each to produce their books of account on oath, and what shall appear due, to be paid with interest when and where the master shall appoint. Fin. R. 431. Mich. 31 Car. 2. Chandler v. Dorset.

3. Tho' length of time is no bar between merchant and merchant, yet dealings having ceased many years between them, and after disputes having acquiesced till the death of one of them, the Court will not decree an account with the survivor, but leave the plaintiff to his remedy at law. 2 Vern. 276. Mich. 1692. Sherman v. Sherman.

4. Among merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it in a second or third post; per Commissioner Hutchins. 2 Vern. 276. Mich. 1692. Sherman v. Sherman.

5. If any partner borrows any of the partnership-money, his own share

share shall be answerable for it, and shall not be permitted to come into equity and pray an account without making a satisfaction for the debt. Abr. Equ. Cases 9. Trin. 1728.

[For more of Partners in general, see Bankrupts, Bills of Exchange, and other proper Titles.]

## Party.

(A) Parties in Suits in Equity. Of the Necessity of having proper Parties; and Who shall be in general.

1. Garnishee or vouchee are not parties till they have appeared and enteredpleaded or entered into the warranty. Br. Refommons, pl. 1. cites 3 H. 6. 45.

2. Several causes were brought to hearing together, where some that were parties to one bill were not so to another, and decreed in one against one who has no party to that suit; Finch C. said, that on hearing of them together, the justice which was to be done on them all appeared, and you shall not sever them now. 2 Chan. Cases 234. Trin. 29 Car. 2. Turney v. Daws and Mayor. [ 248 ]

3. The rule in equity is, where two or more are liable to a demand, you shall not proceed against one alone, but must bring all the persons liable before the Court. 2 Vern. 195. Mich. 1690. in Case of Jackson v. Rawlins. S. P. in case of several adventurers. Fin. R. 96. Hill. 25 Car. 2.

Ireton v. Lewis.—But where a bill was brought by some proprietors in behalf of themselves, and all other proprietors except the defendants, it was held good on demurrer by Ld Maclesfield without naming them, there being a great number of them, and so no coming at justice, because of continual abatements by death &c. Chan. Prec. 592. Trin. 1722. Anon.—See (B) pl. 66. Brown v. Howard.

4. Where there were several trustees, and all were dead, and a bill was brought against the representative of A. the survivor, it was objected, that the representatives of the other trustees ought to have been before the Court; but the plaintiff insisting only to have an account of what came to the proper hands of A, and of his receipts and disbursements only, and not of any joint receipts or transactions by him with the other trustees; the objection

was over-ruled. Hill. 9 Ann. Abr. Equ. Cases 74. *Lady Selward v. the Executors of Harris & al.*

5. A *nominal person only that has no interest* is no necessary party; and a suit may go on without him. MSS. Tab. cites 12 March 1725. *Butler v. Pendergrafs.*

6. In a Court of Equity it may be necessary to make one person a defendant in a cause, *because another is intitled to his assistance.* Barn. Ch. Rep. 361. says, it was said by Ld. Chancellor. Hill. 1740. in the Case of *Lowther v. Carlton.*

7. Ordinarily, several plaintiffs may not join for *different causes*; nor may several defendants be put in one bill, where the cause and *charge* against them is *altogether different.* P. R. C. 262.

*Curf. Canc. 460. S. P. — Yet sometimes, for avoiding multiplicity of suits, and to bring all parties, who may be affected by the decree, before the Court, the suit is by parties who have separate rights and interests, as devisees, legatees, creditors, and such like.* P. R. C. 262.—*Curf. Canc. 460. S. P.*

8. Care should be taken, that whosoever sues in his own right should have no legal *disability* upon him, as *outlawry, excommunication, an alien enemy &c.* for if he has any, it may be pleaded. P. R. C. 262.

9. *But where alien enemies by permission come here for refuge, and live peaceably, the Court will greatly discountenance a plea of alien enemy.* Ibid.

## (B) Parties. To Bills in Chancery. *Who.*

*Administrators.*

1. A. Indebted by judgment, dies intestate, and leaves a wife and a son; the wife takes administration, and enters on the lands as guardian, and made J. S. her executor, and dies. J. S. possessed the personal estate of A. and the wife, and entered on the lands as guardian to the son. The son dies. The heir of the son pays 200*l.* on the judgment, and brings his bill to be repaid. He should make the *administrator de bonis non* of A. party. 2 Chan. Cases 197. Trin. 26 Car. 2. *Bressenden v. Deereets.*

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Ibid. 334.  
S. P. Hill.  
30 Car. 2.  
Griffith v.  
Betwman.

2. Bill by a judgment creditor to *discover intestate's estate*; defendant *demurs*, for that the *administrator* is not made a party, he being the person to whom defendant ought to pay what (if any thing) is due, and that the plaintiff is not capable to demand or discharge the same, and then pleads the statute of limitations. The plea and demurrer were allowed. Fin. R. 303. Trin. 29 Car. 2. *Rumney v. Mead & al.*

3. A. leaves 100*l.* legacy to B.—C. claims this 100*l.* as a gift by B. to C. a little before B.'s death. The *administrator of B.* must be made a party as well as the executor of A. Fin. R. 387. Trin. 30 Car. 2. *Wall v. Eastmead and Hakes.*

4. A bill is brought, and a decree had against *some administrator*

*frator and her baron; the feme dies.* Whether the plaintiff can proceed against the baron, without bringing the *administrator of the wife* before the Court? 2 Vern. 195. Mich. 1690. Jackson v. Rawlins.

5. A bill was brought by creditors of the husband against the widow who had an adequate jointure to her whole fortune, but was in consideration of part only, and the remainder was out upon bond un-altered, and it was to subject the remainder to pay debts; it was objected, that the administrator of the husband was not made a party; but the wife being called *administratrix in the bill*, and having by her answer confessed that she had possessed the personal estate and disposed of it, and being the person by law intitled to administration, though she denied by answer that she had taken administration, the Court over-ruled the objection. Ch. Prec. 63. Mich. 1696. Cleland v. Cleland.

6. Bill by the heir to avoid a lease made by his father, who was at the time a *lunatick*; the *attorney general* must be made a party. Fin. R. 135. Mich. 26 Car. 2. Leigh v. Wood and Leigh.

Attorney-General.

7. B. was indebted to A. by bond, and was *outlaw'd before judgement at A's suit*. A. brought his bill in equity against B. and one C. a trustee of an annuity payable to B. of 20 l. a year devised to B. out of a personal estate, to subject this annuity to A's debt. Ld. C. Parker directed the plaintiff to get a grant from the Exchequer Court, and make the attorney general a party, and then come back again hither. Wms's Rep. 445. Trin. 1718. Balch v. Wastall.

8. A decree was made in the time of King Cha. 1. for payment of 40 l. a year out of particular lands formerly part of the forest of Bladen to the vicar of C. in Wiltshire, in lieu of tithes. A bill was brought against the land-owners to establish a right to this 40 l. a year. It was objected that these land-owners were tenants to the Crown, of lands lying within the bounds of the forest, which formerly paid no tithes, and that the attorney-general should for that reason have been made a party. But it was answer'd, that it did not appear by the bill that they are lessees under the Crown, and the defendants have not insisted upon it in their answers, and so that is out of the case. And the Court took no notice of the objection. G. Equ. Rep. 230. Pasch. 12 Geo. in the Exchequer. Cuthbert v. Westwood & al.

9. Bill for discovery of a bankrupt's estate; defendant demurr'd, because the *bankrupt* was not made a party; and allow'd. Vern. 32. Hill. 1688. Sharp v. Gamon.

Bankrupt.

10. The plaintiff being a *residuary legatee* brought his bill against the defendant, who was one of the executors (without his co-executor) to have an account of his own receipts and payments. Defendant insisted at the hearing, that his co-executor ought to be made a party; and that tho' a bill might be brought against one factor without his companion, if he were beyond sea, yet that had been allowed only for necessity, and that it was

Beyond sea.  
Persons beyond sea.

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otherwise in case of executors. Per Ld. Chancellor the cause shall go on, and if upon the account any thing appear difficult, the Court will take care of it. The reason is the same here, as in the case of joint factors; and the *running out of process in this case is purely matter of form*, and he doubted whether a foreigner can be served with a subpœna in a foreign country. Ch. Prec. 83. Mich. 1698. Cowslad v. Cely.

11. B. in 1661 made his will, and amongst other legacies *devifed an annuity of 20 l. per ann. to C. to be paid quarterly*, and gave other legacies, and then has this clause, *all the rest of my real and personal estate not before bequeathed, (my debts being paid) I give to my brother D. and makes him sole executor.* D. paid the annuity several years and made his will, and *charged all his real and personal estate with this annuity*, and devised all his real and personal estate in England (part of which was the estate of B.) to his 2 daughters who lived in England, and were defendants; and all his real and personal estate in Barbadoes to his *two other daughters that lived in Barbadoes*, and were no parties to this suit. The 2 daughters here paid the annuity several years, but then stopp'd payment, on pretence that the words of B.'s will did not charge his real estate with this annuity; or if they did, yet the personal estate ought to be first exhausted, which did not appear to be. And the real and personal estate in Barbadoes being equally liable by the will of D. the daughters, who have those, ought to be made parties; for they might have made satisfaction; or however they ought to have been before the Court, that the defendants might at the same time have a decree against them to pay their proportion; for tho' at law the party may take his remedy against which he pleases; yet in equity all must be parties, that right may be done to all at the same time; on the other side it was said, admit it to be so in case it may be easily done, yet it is *impracticable* in this case, and therefore ought not to be required; and so held my Ld. Keeper, and that the lands were charged by B.'s will; and if any satisfaction has been made by those in Barbadoes, it lay on the defendants' part to shew it. Pasch. 1702. Abr. Equ. Cases 74. Quintine v. Yard.

*Cefly que trusts.*

12. In case of a *discretionary power* lodg'd with the wife to dispose of a sum of money *among his 3 children*, and the wife being step-mother to one of them, made an *unequal distribution*, the Court inclined to relieve; but it was moved there could be no decree, because the *other daughters* were no parties; it was answered, they may come in before the master. 2 Chan. Cases 230. Pasch. 28 Car. 2. Craker v. Parrot.

13. *Trustee* for 3 persons is called to an account. All the *cesly que trusts* must be parties. Vern. 110. Mich. 1682. Hanne v. Stevens.

*A cesly que trust, must in all cases be made a*

14. In a bill to be relieved touching a lease for years, or other personal duty against executors. Tho' the executors are but *executors in trust*, yet it is not necessary to make the *cesly que*

*que trusts or residuary legatees parties.* Vern. 261. Mich. 1684. party, tho' it be not always necessary to make the *trustee* party, but then the *cestui que trust* must undertake for the trustees conforming to the decree. Ch. Prec. 275. Hill. 1708. Kirk v. Clark & al. — *In some cases a trustee may sue in his own name*; but ordinarily *cestui que trust* must be a party. P. R. C. 263.

15. City of London brought debt for rent against their *lessee of the water-works*. The assignees file their bill, and obtain an injunction. The city file their cross bill against the assignees for a discovery. It came out by the defendant's answer to the cross bill, that it was *turned into stock-jobbing and divided into shares*; objected to the cross bill, that the defendants were only trustees for the shares; besides a demand for rent was only proper at law, but if they will come into equity they must make the *cestui que trusts parties*; but decreed that the cross cause was well brought, the plaintiff in it being driven into equity by the defendants, and they have their remedy from the sharers who were their under-tenants. MS. Tab. cites 9 Feb. 1702. Richmond v. Mayor of London. Chan. Prec. 156. S. C. — 2 Vern. 421. pl. 384. City of London v. Richmond & al.

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16. A. is *tenant for life of a trust*, remainder to his sons. A. before a son born, brings a bill against the trustees, and an account is decreed and taken. The sons shall be bound by this account; for all persons were parties that could then be made parties. 2 Vern. 527. Mich. 1705. Leonard v. Ld. Suffex.

17. A bill was brought by a jointress, to *supply a surrender of a copyhold*. The devisee of the lands, the heirs at law, and the lord of the manor were made parties. Fin. R. 388. Trin. 30 Car. 2. Marlow v. Maxie, Chaplin & al.

Copyhold  
Case.

18. A. *devised lands* to B. C. and D. for 7 years for payment of debts, and devises the fee afterwards to J. S. In a bill by J. S. to compel payment of the debts, he must make *all the devisees parties*. Fin. Rep. 278. Hill. 29 Car. 2. Pigg v. Coldwell.

Devisees.

19. A. *constituted B. and C. his executors*, and *if they would not take upon them the executorship, then he appointed D. and E.* Afterwards B. and C. refused; by this D. and E. are executors, and B. and C. are not. So that in actions brought for debts of the testator, B. and C. need not join or be named. Went. Off. Executor 10, 11. cites 3 H. 6. fo. 6.

Executors.

Where there were four executors, and a bill is brought against one,

and he in his answer confessed that *he alone proved the will and acted in the executorship, and that the others never intermeddled therein*, it was said to be good, and that in such case in an action at law it would have been sufficient to have named him only, who prov'd the will; much more in a court of equity. And Ld. Keeper was of the same opinion, and said, if the other executors had any demands out of the estate, they might be at liberty to come in before a master, if they thought fit. G. Equ. R. 75. Hill. 8 Annæ. Brown v. Pitman.

20. Note, by the best opinion in Chancery, upon subpœna against executors the one shall not answer without the other. Br. Responder, pl. 37. cites 8 E. 4. 5.

All executors tho' one of them be an infant of five years

old, must sue and be su'd. 3 Ch. Rep. 92. 1647. Offley v. Jenny and Baker. — N. Ch. R. 44. S. C. — Tho' an executor does actually release, yet he must be made a party to the suit. Vern. R. 31. Hill. 1681. Smithby v. Hinton. — A creditor cannot sue one co-executor alone without joining the other, 9 Mod. 89. Hill. 13 Geo. Scarry v. Morfe.

21. Two executors are plaintiffs, *one is excommunicated*, the other shall be seivered and the defendant shall answer him. Toth. 137. cites Hill. 39 Eliz. Tomes v. Vaughan.

2 Ch. Cases  
29. Pasch.  
32 Car. 2.  
Meeker v.  
Tanton.—

22. Executor of a mortgagee ought to be a party where the heir sues to have the money paid or to foreclose the mortgage. Ch. Cases 51. Pasch. 16 Car. 2. Freake v. Hearsey als. Horsey.

Nell. Ch. R. 93. S. C.—Where the heir of the mortgagee foreclosed the mortgage, the executor of the mortgagee not being party, upon a bill by the executor against the heir of the mortgagee and mortgagor, the land was decreed to the executor. Arg. 2 Vern. 67. Trin. 1688, cites it as decreed in Case of Gobe v. the Earl of Carlisle.

23. Money after a decree inroll'd was certify'd due to the executor of the plaintiff, and upon exceptions to the report, because he was no party it was disallowed. Bill dismiss'd unless cause. 3 Ch. R. 63. 22 Car. 2. Cullam v. Dove.

24. Obligees in a marriage settlement in trust and the executors of the obligor must be parties to the bill, either as plaintiffs or defendants. 3 Ch. R. 52. . . . Car. 2. Bagg v. Foster.

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25. 3 Sureties; one pays the debt, another dies insolvent. In a bill against the 3d, the executors of him that dy'd insolvent must be made parties. Finch's R. 15. Mich. 25 Car. 2. Hole v. Harrison.

26. A. seised of lands in fee raised a term of 1000 years to B. to be extinguis'd if A. paid 80l. per ann. to B. his executors &c. for 42 years, which being expir'd, and A. being dead, his heir brought a bill for a surrender of the residue of the said term. Defendants demur because the executor or administrator of A. was not made a party; but held insufficient. Fin. R. 104. Hill. 25 Car. 2. Bampffield v. Vaughan.

27. Bill against defendants as executors to pay a legacy of 100l. devised to plaintiffs by their father, and to account for the surplus of his estate; one of the defendants demurr'd; for that he and one J. D. were made executors durante minore atate of A. the plaintiff's brother, who attained his full age and dy'd, so that the said executorship being determined, some other executor or administrator ought to be call'd to answer who might possibly make out some sufficient release or discharge, and demurr'd as to the account of the surplus; because there are others to whom defendants are liable to account as well as to the plaintiffs, and they not parties to this suit, so may be put to unnecessary trouble and suit concerning the same. The Court ordered defendants to answer as to the 100l. but allow'd the demurrer as to the demand of account of the surplus, and that plaintiffs might bring a new bill as to that. Fin. R. 113. Hill. 25 Car. 2. Atwood and Davis v. Hawkins.

P. R. C.  
162. S. P.  
—S. P.  
Curf. Canc.  
400.

28. A legatee of a term su'd for it, but made not the executor party, and therefore the bill was not good, tho' the plaintiff alleged in the bill, that the executor had assented to the legacy. Chan. Cases 277. Trin. 28 Car. 2. Moor v. Blagrave.

29. A. gives bond to B. in trust for C. a feme covert. A. after death of the husband pays the money to the executor of the husband.

husband. Ordered to make the *executor of the husband* a party. Fin. R. 330. Mich. 29 Car. 2. Flavel v. Ball.

30. If a judgment be had at law against one obligor, you may sue the *executor* of him alone to discover assets &c. because the bond is drown'd in the judgment. Quære. 2 Vent. 348. Mich. 31 Car. 2. Anon.

31. Defendant demurr'd for want of proper parties, *one of the executors* not being made a party, and the *demurrer overrul'd*, because the plaintiff had alleged in his bill that he *knew* and *not who was the other executor*, and pray'd that defendant might discover who he was and where he liv'd. Vern. R. 95. Mich. 1682. Bowyer v. Covert.

So if an executor in trust is *en-law'd*, and a *suitness* prov'd that he had in-quired after but could

not find him, this was thought a full answer to the objection, that such executor was not made a party. Wms's Rep. 684. Mich. 1720. in Case of Heath v. Percival.

32. A. devised that his executors should sell his land, and made 2 executors; *one executor died, and the other renounced*, by reason whereof *administration was granted to J. S. who brought a bill to compel a sale*. It was objected, that there wanted parties, the executor not being made defendant; for tho' he had renounced, yet the power of sale continued in him, and was altogether collateral to the executorship. But there being only a power and *no estate devised to the executors*, this objection was overrul'd. 2 Wms's Rep. 308, 309. Mich. 1725. Yates v. Compton.

But the Reporter adds a quære. Ibid. 309. —S. C. Cases in Equ. in Ld. King's time 54. Hill. 11 Geo. 1. says, the bill was brought against the

heir at law, and as to the executor's not being made party it was answered, that the *estate descended to the heir at law, and he is only a trustee to the use of the will since the executor renounced*, and so there was no occasion to make him party; and it was so held.

33. Ld. Chancellor doubted, whether a foreigner can be served with a subpoena *in a foreign country*. Hutchins said, he remembered that the great Duke of Tuscany had laid several persons by the heels for executing a commission to examine witnesses in his dominions without his leave. Ch. Prec. 83, 84. Mich. 1698. Cowslad v. Cely.

Foreigners.

34. Where the executor sues an account of the surplus money being devised to him, the heir should be party, or else he is not bound. Per Ld. Coventry. N. Ch. R. 34. Gird v. Toogood.

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Heir.

35. A. seized of lands in fee binds himself and his heirs in a bond, and devises his lands to J. S. in fee. If the obligee brings a bill upon the statute 3 & 4 W. & M. 14. to subject the devisee to the payment of debts, he must make the heir of the devisor a party; otherwise if there be no heir. And perhaps it may be otherwise too, if the bill had charg'd that the plaintiff had made inquiry, and could find or discover no heir. Wms's Rep. 99. 100. per Lord C. Cowper. Mich. 1707. Gawler v. Wade.

Joint-conveyancers, factors &c. Vide (A) pl. 3 and in marg. and see pl. 14. 55. infra.

36. If obligors are bound jointly and severally, and one dies, the executor of the deceased obligor may be sued in equity for the debt, without making the surviving obligor a party. Per Lord King; for were it otherwise, what was intended to strengthen the security would weaken it. 2 Wms's Rep. 313. Mich. 1725. Collins v. Griffith.

37. 'Twas admitted that if there are *three joint-factors*, and a man has a *demand against them jointly*, a bill against any *one of them* for the whole duty shall be good, and that there are divers precedents of it. Sed quære if it be not only where the factors are *beyond sea*. Vern. 140. Hill. 1682. in Case of Barker v. Wild & al.

*Joint tenants.*

38. Two *jointtenants* for life must both be parties plaintiffs in a bill, or the bill must shew that one is dead. Fin. R. 82. Hill. 25 Car. 2. Weston v. Keighly.

39. *Joint-lessees* of water-springs near the city of London brought a bill, and suggested the third to be dead, who was living, and held not well; and it being for an account, it was held per Cur. that bringing him before the Master would not be sufficient. Wms's Rep. 428. Pasch. 1718. Stafford v. City of London.

*Legatees.*

40. Administrator of A. executor and legatee of B. brought his bill against D. for an *account of B's estate*, who was the father of D.—D. *demurr'd*, because his brothers C. and E. who are *legatees* by the said will, and are *charged to combine with defendant*, are not made parties; demurrer allow'd with the ordinary costs of 5 marks. Fin. R. 202. Hill. 27 Car. 2. Galle v. Greenhill.

When legacies are given to diverse persons, each alone may sue for his own legacy.

41. A. devises 100 l. *a piece to B. C. D. and E. and makes them residuary legatees*; if either of them sues for the legacy, the other three need not be made parties; but if for the residuary part, they must be *all* made parties. Fin. R. 243. Hill. 28 Car. 2. Dunstall v. Robet.

2 Chan. Cases 124. Mich. 34 Car. 2. Haycock v. Haycock———Tho' the legacies of each were to *increase or diminish* as the estate should do in the hands of executor. Ibid. S. P. 2 Chan. Cases 178. Mich. 2 Jac. 2. Attorn. Gen. v. Rider.

42. A *legacy given to two*, one cannot sue for it. Per Sol. Gen. 2 Chan. Cases 124. Mich. 34 Car. 2. Haycock v. Haycock.

43. If *residuum bonorum* be given to *divers*, they must all join. Ut sup. per eundem.

44. If legatee brings a bill *against an executor* for discovery of assets, 'tis no objection that he has not made the *other legatees* parties. 12 Mod. 522. p. 13 W. 3. Anon.

*London Cases.*

45. While the *judgment against the Charter of London* was in force, a bill brought for a debt due from the Chamber of London was against the old Lord Mayor and the Commissioners. Vern. 311. Hill. 1684. Naylor v. Cornish & al.

*Lord of a Manor.*

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Bill was dismissed, because the tenants were

46. The *plaintiff* by his bill *pretends title to certain lands as freehold*, which lands *Arnold the defendant claims to hold by copy of Court-roll* to him and his heirs, and *prayed in aid of S. the lord of the manor*; nevertheless the plaintiff served the said Arnold with process to rejoin, without calling the said S. thereunto, which this Court thinks not meet, therefore ordered the plaintiff shall no more proceed against the defendant before he have

have called the said L. in process. Cary's Rep. 81. 82. cites only parties and not the lord, they 19 Eliz. Lucas v. Arnold. having attorned to a new title against their first lessor. Mfs. Tab. cites 7 March 1717. Ward v. Reily.

47. Where a third mortgagee to bar equity buys in the first, he is not obliged to make the *second mortgagee* party to that bill and decree. 3 Ch. R. 86. 26 Car. 2.—N. Ch. R. 71. 24 Car. 2. Sherman v. Cox. S. P. and S. C. Mortgagee, Mortgagee, Remainder-man of mortgage.

48. A bill was to redeem or foreclose a mortgage. 'Twas objected that the defendant was only tenant for life of the equity of redemption, and the *remainder-men* over were not made parties. The Court directed a bill to be brought by the defendant to have a sale made, the mortgagee's debt paid, and the surplus distributed amongst the tenants for life and the remainder-men in proportion, according to their respective interests. 2 Vern. 117. Mich. 1689. Thynn v. Duvall.

49. The plaintiff's cause was heard before the Master of the Rolls, and the Master ordered that *for want of proper parties* (viz. for that the *mortgagor* was not made a party, the plaintiff being a second mortgagee, and contesting the validity of the first mortgage pretended to be made to the defendant, and to have account if a true one &c.) the plaintiff should pay 5 marks costs, and make the mortgagor a party. The plaintiff sets down his cause as an original cause, and not by way of appeal, having indeed amended his bill, but *never served the mortgagor with process*, which he pretended he could not do, because the *mortgagor* was *beyond sea*, but that they left a subpoena at the last place of his abode, viz. at the King's Bench, where he had been prisoner, and escaped: but the Court would not *hear the cause*: for the plaintiff ought to have the mortgagor's answer, or run out all the process of contempt to a *sequestration*, before he can hear his cause against the defendant. 3 Ch. R. 215. Thompson v. Baskervill.

50. A mortgagee may foreclose another mortgagee whom he has brought before the Court, tho' there are some *intervening incumbrancers* not made parties, and without first foreclosing the mortgagor. 2 Vern. 518. Mich. 1705. Draper v. Jennings.

51. An *estate is charged with several incumbrances*, come semble, *one incumbrancer may sue without making the rest parties*; at least it is cured by a decree directing an account to be taken of all the mortgages and incumbrances that affect the estate. MSS. Tab. 12 July 1721. Odell v. Graydon.

52. Where a *settlement is set up*, all the mean incumbrancers, and likewise the remainder-men must be made parties. MSS. Tab. 1721. Edgeworth v. Edgeworth.

53. *A. mortgaged to B. for 500 years to secure 350l. Afterwards, and so long since as 1704, B. made an under mortgage to C. for 300l. B. died. C. brought a bill against A. to redeem.* The representatives of B. ought to be made parties to prevent another account as to what is due upon the original mortgage to B. 2 Wms's Rep. (643) Mich. 1731. Hobart v. Abbot.

Obligors  
and Obligees.—See  
pl. 36.

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54. Bill on a counter-bond entered into by *a great number of obligors*, some of whom were dead and left assets, and others dead and left none, and others living. The Court may proceed against any, and make a decree, tho' *all the obligors* are not before the Court; and the reason why all the obligors are to be before the Court is a rule of conscience, and to prevent further suits for *contribution*, but is not of necessity, and therefore may be *dispensed withal*, especially where the parties are so many, and the *delays* so *multiplied* and continued. Fin. R. 105. Hill. 25 Car. 2. Lady Cranborne, Bowyer, and Dalmahoy v. Crisp.

55. If one sues in Chancery an executor of one obligor to discover assets, you must make *all the obligors* parties that the charge may be equal. 2 Vent. 348. Mich. 31 Car. 2. Anon.

56. Whether you may not sue the principal, and leave out them that are bound only as *sureties*? 2 Vent. 348. Mich. 31 Car. 2. Anon.

57. Bill for relief against a *bail bond fraudulently assigned* by the sheriff. The plaintiff in the action at law must be made a party. Vern. 87. Mich. 1682. Israel v. Narbourn.

Occupiers or  
Possessors.

58. A bill was brought against land-owners to *establish a right of 40l. a year instead of tithes*, which by a decree in time of Cha. the First was to be paid out of particular lands (formerly part of the forest of Bladen) to the vicar of Cricklade in Wils. It was objected, that the occupiers as well as the land-owners ought to be made parties to the bill; for that a decree against the land-owners would not affect the occupiers. To which it was answered, that it would be endless to make all the occupiers parties; and if that was necessary to be done, the plaintiff could never come at his right, for there were great numbers of them, and any single one dying would put the plaintiff to his bill of revivor, and cited the Case of BISCOE v. THE UNDERTAKERS OF THE LAND BANK, before Ld. Keeper Wright, who said, he would not oblige them to bring all before the Court, since the right might be determined by having a few, which the Court thought reasonable. Per Cur. tho' we can decree only against the land-owners, who are before the Court, yet that will affect the lands; the 40l. per ann. ought to be apportioned among the owners, and the original decree may be carried against the occupiers. And decreed a commission should go to inquire into, and ascertain the value of the lands, the owners and occupiers names, and what proportion of the 40l. per ann. each tenement ought to pay. G. Equ. Rep. 230. Pasch. 12 Geo. 1. Cuthbert v. Westwood & al.

59. If a man's goods come into the hands of different persons one after another, an action of *trover* may be brought against any of the persons that has ever had the possession of the goods, without making the other persons defendants. Barn. Ch. Rep. 325. cites it as so said by Ld. Chancellor in the Case of Harrison v. Pryse.

60. A. B. who had been Governor in the East Indies, *par-*  
*cha'ed*

*chased 1000l. South-Sea stock, and accepted it in the South-Sea books a short time after he had bought it. Another A. B. of R. who had likewise South-Sea stock, got this 1000l. stock placed to his account in the South-Sea books under the description of 1000l. stock belonging to A. B. of R. Some years after, A. B. of R. transferred this 1000l. stock to J. S. his broker, in order to sell it for him, and J. S. sold it accordingly. A. B. the governor died. The fraud was discovered, and satisfaction was demanded of A. B. of R. by M. the executor of A. B. the governor, which struck A. B. of R. with such confusion that he died the next day. M. exhibited a bill against the administrator of A. B. of R. to be relieved on account of this fraud. It was objected on the hearing that J. S. should have been made defendant. But Ld. Chancellor said, his opinion was, that there was no occasion for it. Barn: Ch. Rep. 324. Hill. 1740. Harrison v. Pryse.*

61. A rector of one of the new churches brought a bill against the treasurer of the money allotted for the building them, praying to have his dividend &c. and that the remaining part of the money which had not already been laid out in the purchase of lands, might now be laid out in a purchase. Ld. Chancellor thought the treasurer was nothing more than an officer or servant under the commissioners, and that he is bound to act according to their directions, and that the commissioners ought to have been made parties. And accordingly they were afterwards made defendants. Barn. Ch. Rep. 377. Hill. 1740. Vernon v. Blackerby.

Officers.

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62. Bill for relief against an award made by some members of the East India Company. Those members and the arbitrators are made defendants; they may demur to the whole bill without answering to the fraud; for the plaintiff can have no decree against them, nor can their answers be read against the Company; but they should be examined as witnesses. 2 Vern. 380. Trin. 1700. Dr. Steward v. East India Company.

Parties interested &c.

63. In case of apportionment of rent by reason of several purchases, it seems all the purchasers should be made parties, yet in case of circumvention, the want of such parties was taken no notice of. Vern. Chan. Cases 273. Hill. 27 and 28 Car. 2. . . . v. Hawkes.

Purchasers.

64. Lands were devised in trust for two young ladies, and if they died within age, and before marriage, the remainder over; now the youngest being 16 years old, and the other 18, they brought their bill for execution of the trust, but it was dismissed for want of making the remainder-man party, per Ld. Wright. 12 Mod. 560. Mich. 13 W. 3. Anon.

Remainder-men  
See pl. 48.

65. Lands on marriage of A. with M. were conveyed in strict settlement, but in the deed was a proviso, that A. should have a power of disposing of those lands in such manner as he should think proper, in case he should settle other lands of 100l. a-year to the same uses. They had issue one daughter. J. S. articulated with A. for

for

for the purchase of the settled lands without having any notice of this settlement. He entered upon the premises, and then hearing of the settlement, refused to pay the purchase money. A. brought his bill against J. S. to compel payment, suggesting that *at the time of the contract, he had settled other lands of 100l. a-year to the same uses.* Ld. Chancellor was of opinion, that the *wife and daughter ought to be made parties* to this suit; for otherwise they may bring a new bill, and overturn the title of the defendant, and the bill may be amended by praying that they may join in the conveyance to the purchaser, and a decree may be made to the purpose. And decreed accordingly. Barn. Ch. Rep. 371. Hill. 1740. Lamplugh v. Hebban.

*Tenants of a manor.*

Per Lord Macclesfield, Ch. Prec. 591. The Proprietors of Temple Mills Brafs-works v. the late Managers. S. P.

*Tertenants.*

A. charged all his lands in Chigwell in Essex, and Enfield in Middlesex, with 20l. a year to the poor of Enfield; in a suit on behalf of this charity for the arrears of this rent-charge, it is not necessary to make all the tertenants of the lands, out of which the rent issues, parties. Wms's Rep. 599. Hill. 1719. Attorney General v. Wyburgh & al.

66. On a bill to settle the *customs of the manor as to fines upon deaths and alienations*, an issue was directed, and verdict given; Lord Keeper Wright held, that though *some only* of the tenants were parties to the bill, yet the rest would be bound, Mich. 1701. Abr. Equ. Cases 163. Brown v. Howard.—Ld. Keeper cited Ld. Gerard's Case.—And Ld. NOTTINGHAM's Case, and said, that in these and 100 cases more all were bound, and that no right could be done otherwise by reason of perpetual abatements,—and cited Sir WILLIAM BOOTHBY's Case, in the dutchy where such bill was amended and made to be on behalf of the plaintiffs and all the rest of the tenants.

67. To a bill for *charitable uses* all the tertenants need not be made parties. 1 Salk. 163. in Canc. 1712. Attorney General v. Shelley.

[ 257 ] 68. Note, by the best opinion in Chancery, the *one* scoffee of trust shall not answer without his companion. Br. Responder, pl. 37. cites 8 E. 4. 5.

*Trustees.*

69. Devise of *personal estate to trustees* to pay to his wife during her life 100l. per annum *in lieu of dower*: the *executors in trust* ought to be made parties, and leave to do so was given *at making the decree.* Fin. R. 134. Mich. 26 Car. 2. Lefquire v. Lefquire.

70. Bill for a specifick performance of a *covenant with A. for the benefit of B.*—A. must be made a party to the suit; but if it had been only a *promise*, either A. or B. might have brought the action, according to ROLL and YATE in Yelv. 177. Hill. 1688, 2 Vern. 36. Cook v. Cook.

71. In directing an issue a *bare trustee* ought not to be a party; for that might hinder his being an evidence. MS. Tab. cites 1703. Dawson v. Franklin.

72. By a marriage settlement an estate was limited to *A. his heirs and assigns during the lives of the plaintiff and his wife, in trust to employ the profits to their use, with remainder over*; upon a bill

a bill to set aside a former settlement made by him as gotten by fraud, plaintiff had leave to amend his bill, and make A. who had the legal estate, a party, and without which he could have no decree. Hill. 10 Geo. 9 Mod. 80. *Hobson v. Stancer.*

73. Where a trustee conveys over a real estate in his hands to another, who has no notice of the trust, and a bill is brought by cestui que trust, the trustee must be made a defendant; per Ld. Chancellor. Barn. Ch. Rep. 325. Hill. 1740. in *Case of Harrison v. Pryse.*

74. On a motion at the Rolls after hearing, some of the plaintiffs got an order *ex parte* to strike out the name of one of the plaintiffs, and make him a witness at a trial, which surprised the defendant, and the Court set aside that trial, and made the witness a plaintiff again. 2 Chan. Cases, 80. Mich. 33 Car. 2. *Exson v. Turner.*

Witness.

**(C) Want of proper Parties. The Effect thereof.**

See Abatement.

1. **I**N all suits great care should be had, that there be proper parties for and against whom the Court may respectively make a decree; and also, that there be all necessary ones; for if upon the face of the bill it appears that any of these are wanting, the defendant may for that cause *demur*; or if he does not, yet the Court many times upon hearing will not for want of them proceed to a decree; or if it does, the decree may be *reversed*; or if it be not reversed, yet none but the parties to the suit, and those claiming under them, are bound by it. P. R. C. 261.

S. P. Curf. Canc. 459.

2. Appellant to pay the *costs* of the day for want of proper parties, and to be at liberty to amend his bill. MS. Tab. cites 9 March 1718. *Morrison v. Nesbitt.*

**(D) Who shall be said to be Party. When and by what praying Process.**

1. **A**. A bankrupt brought a bill against B. his supposed debtor to compel him to account; B. insisted that the assignees ought to be made parties; A. by order amended his bill, and charged the assignees, but the prayer of process was (as before) only against B. who again put in the same plea. And by Ld. C. Parker, they only are defendants against whom process is pray'd, and no process being pray'd against the assignees, they are still not defendants, and consequently the plea is good. Wms's Rep. 593. Mich. 1719. *Fawkes v. Pratt.*

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## (E) Of altering the Parties.

By motion of court, either plaintiff or defendant  
 1. **L**EAVE was given to amend a bill, and *add plaintiffs* as well as defendants parties. Fin. R. 114. Hill. 25 Car. 2. Hudson and Fisher & al. v. Fletcher.

may add parties before answer. P. R. C. 263. — S. P. Curf. Canc. 461. — Any time before *examination*, the Court will suffer the plaintiff to amend his bill, and *add parties*, and without costs, if there be no plea or demurrer, and so as the addition be not so great as the defendant will need a new copy of the bill, nor need put in a further answer, and that the plaintiff amend the defendant's copy according to the addition &c. P. R. C. 264. — S. P. Curf. Canc. 461.

S. P. Curf. Canc. 461. — So a defendant may be struck out any time before hearing, so that those left are sufficient to answer the costs; or if they be not, yet it may perhaps be allowed upon giving security to answer the costs. P. R. C. 263.  
 2. *Plaintiffs* may be struck out of the bill *any time before hearing*, so that those left are sufficient to answer the costs; or if they be not, yet it may perhaps be allowed upon giving security to answer the costs. P. R. C. 263.  
 before hearing; but if it be after appearance, it will be with costs; the bill as to him being dismissed. P. R. C. 263. — S. P. Curf. Canc. 461.

S. P. Curf. Canc. 461. — So if a defendant by answer *disclaim all interest* in the matter in question, or appears to be a disinterested person, his name may commonly be struck out at the request of either plaintiff or defendant. P. R. C. 263. — S. P. Curf. Canc. 461.  
 3. *Before a defendant has answered*, his name may, upon the plaintiff's motion, be struck out of the bill. P. R. C. 263.

S. P. But if a defendant be added after publication, the cause as to such defendant, must be heard upon bill and answer only. Curf. Canc. 461. — P. R. C. 263. S. P.  
 4. The Court will, *after publication*, and any time *before hearing*, upon cause shewn, suffer parties to be added. P. R. C. 264.

S. P. Curf. Canc. 461.  
 5. *After a decree*, and *before it is enrolled*, persons interested may, *by petition*, be made parties, and let into it, if their right be interwoven with the other plaintiffs, and settled (in the general) by the decree, they paying the plaintiffs a proportionable part of the charges of the suit &c. P. R. C. 264.

S. P. Curf. Canc. 462.  
 6. If one be *named plaintiff without his privity* or order, he may come into Court and *renounce the suit*; or he may give a warrant under his hand and seal to counsel to move, and consent that the bill be dismiss'd, or if there be more plaintiffs that it may be dismissed as to him, and it will be dismiss'd accordingly. P. R. C. 264.

[For more of Party in general, see Abatement, Dismission, Joins or Joins, Hearing, Jointenants, and other proper Titles.]

Paupers.

(A) *Who may be admitted a Pauper.*

1. 11 H. 7. **E**Nacls that every poor person having cause of action, shall have original writs and subpoenas gratis; also the Judge or Judges of the Court where the suit depends, shall assign him counsel and attorney, who are thereby enjoined to dispatch his business without fees.

2. In 23 H. 8. cap. 15. of costs, there is a proviso that all and every such poor person or persons, being plaintiff or plaintiffs, in any of the said actions, bills, or plaints, which at the commencement of their suits or actions, be admitted by discretion of the Judge or Judges, where such suits or actions shall be pursued or taken, to have their process and counsel of charity without paying any money or fee for the same, shall not be compelled to pay any costs by virtue and force of this statute, but shall suffer other punishment, as by the discretion of the Justices or Judge, before whom such suits shall depend, shall be thought reasonable; any thing afore rehearsed to the contrary hereof notwithstanding.

A poor man, defendant, in a suit brought in the Court of Common Pleas, applied in the Treasury to be admitted to defend in forma pauperis, but was denied. The statute

for admitting paupers extends to plaintiffs only, and not to defendants. Barnes's Notes in C. B. 227. Pasch. 8 Geo. 2. Anon.

3. It was mov'd to dispauper a plaintiff, because he had a living of 40 l. a year; but because he had sworn that he was indebted more than he was worth, Turton and Gould J. were against it: but Holt held that his being indebted, or his estate being mortgaged, is no reason, and that it is enough that he has a considerable estate in possession. 2 Salk. 537. Mich. 11 W. 3. B. R. Anon.

4. The Court permitted one to defend an indictment of conspiracy in forma pauperis. Pasch. 9 Geo. 2. The King v. Wright.

5. It has been complained of as an abuse, that both parties, plaintiffs and defendants, have been admitted in forma pauperis in the same cause; for that it tends much to the trouble and disquiet of the Court, and encourages the parties to be vexatious. Cur. Canc. 489.

(B) *In what Cases, and how.*

1. **I** F a man will swear to the prothonotary that he is not able to pay for the entering his pleas in the roll, the prothonotary shall enter it without taking any thing. 15 E. 4. 26. b. pl. 2.

L. P. R. tit. Forma Pauperis, says the same was said by Wild at the bar.

2. In an action upon the Case for slanderous words none shall be admitted to sue in forma pauperis; per Houghton J. 2 Roll. R. 237. Mich. 20 Jac. B. R. Anon.

S. P. Curf. Canc. 488. Where a man will [ 260 ] swear that he hath not 10l. in the world, except his wearing apparel, and the thing which he sues for; a Judge will, upon a petition, and such an affidavit, admit him to sue in forma pauperis, and assign him counsel, and an attorney. L. P. R. tit. Forma Pauperis.

3. The way for either party to obtain the admission is, first for the party to make an affidavit before a Master that he is not worth 5l. then to draw a petition to the Lord Chancellor or Master of the Rolls, to be admitted to have a counsel and clerk assigned him, naming whom in the petition. P. R. C. 266.

S. P. Curf. Canc. 488. So as law he must have a counsel's hand to his petition, certifying the Judge to whom the petition is directed, that he conceives the petitioner hath good cause of action; and he must also make oath that he is not worth 10l. all his debts paid, except the matter in question. L. P. R. tit. Forma Pauperis.—The defendant needs no certificate. P. R. C. 266.

4. If the complainant petitions, he must at the bottom of his petition have a certificate under the hands of two counsel, signifying they conceive he has good cause of suit; except the bill be already filed, and then he needs no certificate. P. R. C. 266.

5. This being done, and the affidavit annex'd to the petition, he presents the same; and if there appear no cause against it, my Lord Chancellor, or the Master of the Rolls, underwrites an order according to the petition. P. R. C. 266.

6. Rolle Ch. J. said, that he did not use to admit any one generally to sue in forma pauperis, that is, to sue in all causes, but only to sue so in one cause, by virtue of that admittance, 1654. B. S. So that if he had other cause to shew, he must petition again to be admitted to sue in forma pauperis, & sic toties quoties. L. P. R. tit. Forma Pauperis, cites 1654. B. S.

7. A defendant cannot be admitted to sue in forma pauperis without first moving the Court; by a late rule. Comb. 77. Hill 3 & 4 Jac. 2. B. R. Anon.

See Non-Suit (P).

(C) *Favour'd, Indulged, Punished or Restrained, how far.*

1. **A** Plaintiff was admitted at the commencement of an action to sue in forma pauperis, but before issue he was discharged of it, and after was nonsuited. It seems that he shall not pay costs.

costs within the statute 23 H. 8. 15. because of the proviso. But in this case Coke said, that the statute is that he shall have corporal punishment. Roll R. 88. Mich. 12 Jac. B. R. pl. 39. Anon.

2. A pauper shall not *find pledges*; per Mountrague Ch. J. Roll. Rep. 447. Hill. 14 Jac. B. R. Husley v. Moore.

3. If one that is admitted to sue in forma pauperis, will not proceed according to the rules of the Court, but *useth delays* to vex his adversary, the Court will dispauper him; for the law does not favour the poor to do injury to others, but to help them to recover their right, where they want ability of themselves to do it. L. P. R. tit. Forma Pauperis, cites Mich. 22 Car. B. R.

If a pauper gives notice of trial, and does not proceed, he shall be dispauper'd. 2 Salk. 506. 9 W. 3.

B. R. Anon.—So if he be *non-suited*. Gibb. 161. Mich. 4 Geo. 2. Anon. A motion was made for costs against a pauper for not proceeding to trial; and the Court upon debate ordered costs to be tax'd, and declared that a pauper shall pay costs for all defaults, as an executor or administrator should for their own defaults. Rep. of Pract. in C. B. Trin. 2 Geo. 2. 1718. Walker & al. v. Parker.

4. It was mov'd to *dispauper* the plaintiff in an action of trespass and ejectment, it being proved by *affidavit*, that he was a very vexatious person, having been *thrice non-suited in this action*, and would never pay costs, or make a sufficient lessee to pay them, and had also sign'd a general release to the defendant. Roll. Ch. J. ordered that he be dispaupered, and that he put in an able lessee to pay costs, or otherwise he shall not proceed in this action. Sty. 386. Trin. 1653. Anon.

The Court will dispauper him; for this will be a means to make him less contentious, and the law doth not favour

unnecessary, vexatious suits. L. P. R. tit. Forma Pauperis, cites 1654. B. S.

5. In case of a *non-suit* of a pauper plaintiff, upon inquiry of the practice in such case 'twas certified that the usual way is to tax costs, and if the costs be not paid, that the plaintiff shall be whipt: but 'tis in the discretion of the Court to spare both, upon consideration of the circumstances of the cause, but in the principal case they awarded that the plaintiff should make election to be whipt, or to pay costs. Sid. 261. Trin. 17 Car. 2. B. R. Munford v. Pait.

If a pauper be *non-suit*, there shall be costs taxed, and he shall not go on after without paying the costs, or shewing according to.

the act of parliament that he was whipp'd. Per Cur. Far. 114. Mich. 1 Annz. B. R. Anon.

6. Where a pauper recovers, he shall pay the *box*: per Williams J. 1 Bulst. 170. Trin. 9 Jac. in Case of Moor v. Moor.

7. A pauper shall not pay costs, unless he be *non-suited*; but then he shall pay costs, or be whipp'd. Per Holt Ch. J. 2 Salk. 506. Mich. 9 W. 3. B. R. Anon.

But on a motion that a pauper might be whipp'd for

nonpayment of costs, Holt Ch. J. denied the motion, saying that he had no officer for that purpose, and that he never knew it done. Ibid.—He was order'd to pay costs for scandal. Toth. 237. 6 Car. Higham v. Ladd.

8. Tho' a pauper shall not pay costs, yet he shall have costs. Abr. Equ. Cases 125. cites Pasch. 1701. Scatchmer v. Foulkard.

The plaintiff brought a bill in forma pauperis, and not paupers. Defendant.

had a decree to recover the duty with costs; the Master taxes costs as usual for persons

Defendant moves, that he tax only pauper-costs, and said it was unreasonable the plaintiff should have more costs than he was out of pocket; that it would encourage paupers to be vexatious, to be assured if the cause went against them, they should pay no costs, and if for them, should recover not only the thing in demand, but a good sum of money too, which they never expended; and cited the Case of *HARVEY v. TUDER*, 22 December, 9 W. 3. where the plaintiff who was a pauper, having obtained a decree with costs, and the Master having taxed costs as usual, on exceptions to the Master's report, for that cause the Chancellor allowed only pauper-costs. On the other side it was said, that the counsel, clerks and solicitors gave their labour to the pauper out of charity, and not to his adversary, and therefore he ought to have costs as others, where the decree is for costs generally; though the Court may if they find him vexatious, order *pauper costs* only; but that is by special order, in cases of contempts, insufficient answers &c. but where costs are stated, and of course he is to have the same as those that are not paupers, and cited the Case of *HAUTON v. HAGER*, where the plaintiff a pauper had a decree with costs, and the usual costs were taxed; and on petition that it might be pauper-costs only, the Lord Sommers would not allow it. My Lord Keeper said it was unreasonable any one should have more costs than out of pocket, and ordered the plaintiff and his solicitor to make oath before the Master; and *what they swore they had paid, or were to pay, was to be allowed*, but no further. Chan. Prec. 219, 220. Pasch.—1703. Angell v. Smith.

9. 'Tis a singular favour to admit a defendant a pauper; but if such defendant will *plead a dilatory plea*, the Court will dispauper him. 11 Mod. 84. Trin. 1706. 5 Ann. B. R. Anon.

S. P. Curf. 10. After admittance, *no fee, profit or reward shall be taken of the pauper by any counsel or attorney, for dispatch of his business while it depends in Court, and he continues a pauper; nor any contract or agreement made for any recompence or reward afterwards.* P. R. C. 266. 267.

—If they offend herein, they are to undergo the displeasure of the Court, and such punishment as the Court shall think fit to inflict; and for the pauper's offence herein he shall be *dispaupered*, and never admitted again in the same suit in forma pauperis. P. R. C. 267.—S. P. Curf. Canc. 488.—But tho' the clerks take no fees, strictly so called, of a pauper, yet they make him pay for the labour of writing, which is after the rate of 1 d. per sheet; and this is said to be allowed by the Court. Ibid.

S. P. Curf. 11. If it be made appear to the Court that any pauper has sold or *contracted for the benefit of his suit*, or any part thereof, while the same depends, such cause shall be thenceforth totally *dismiss'd* the Court, and never again retained. P. R. C. 267.

[ 262 ] 12. As a party may be admitted in forma pauperis at any time during the suit; so if at any time 'tis made appear to the Court *that he is of such ability*, that he ought not to be in forma pauperis, the Court will dispauper him. P. R. C. 268.

—There fore where it was shew'd the Court, that a pauper was in possession of the lands in question, the Court ordered him to be dispaupered, though the defendant had a verdict at law, and might take a writ of possession. P. R. C. 268.—S. P. Curf. Canc. 489.

13. No process of *contempt* at a pauper's suit shall be sealed, until signed by his six clerk, who is to take care it be not vexatious or needless. Curf. Canc. 489. cites Ord. Chan. 153.

14. Plaintiff being admitted to sue in forma pauperis *was consueted, and taken in execution for the costs thereof, he having an estate fallen to him since.* It was mov'd to discharge him, because by the law he that sues in forma pauperis shall pay no costs, but suffer such punishment as the Court shall think fit. But the Court was of opinion, that if the plaintiff was a pauper when the cause was tried, he shall not pay costs, and that the descent of lands shall not have relation to that time. And so a rule was made

made to discharge him. 8 Mod. 344. Hill. 11 Geo. 1725. Ancel v. Sloman.

15. In ejectment after issue join'd, defendant mov'd for a trial at bar, which plaintiff opposed, but afterwards consented to upon these terms, viz. that in case of a nonsuit or verdict against the plaintiff, he should pay such costs only as are usually allow'd in trials at Nisi Prius. After making this rule, plaintiff got himself admitted in forma pauperis; and then the cause was tried at the bar, and a verdict found for defendant. Upon the plaintiff's bringing a second ejectment it was mov'd, that it should be refer'd to the Master to tax the costs of the first according to the plaintiff's agreement, which he could not waive by admitting himself a pauper afterwards; and that his bringing a new ejectment (after being cast at the bar) was a strong instance of vexation, which the Court will never encourage. But the Court held, that this agreement of the plaintiff could not preclude him from the benefit of a subsequent submission in forma pauperis, (which may be had at \* any part of the proceedings); for it means only, that if any costs should be judged due, then he should pay Nisi Prius costs only, and not that he should pay costs in all events. Now the only instance in which a pauper shall pay costs is where he has been vexatious, and then the usual way is to dispauper him; but the plaintiff's bringing this second ejectment only cannot of itself be called vexatious; for by the law of England, a man may bring as many ejectments as he pleases, as appears in Jenk. 67. And tho' this is there taken notice of as an inconvenience, yet it appears, that even by the old law, where 2 persons were contesting the title of land, the possession was suffer'd to be changed twice (1. by a real action, 2. by a writ of right), tho' no oftner. And this case is no more. And accordingly the rule of taxing costs was discharg'd. Mich. 13 Geo. 2. B. R. Britton on the demise of Webb v. Grenville.

\* One may be admitted in forma pauperis at any time before trial. Hill. 12 Geo. 2. Langley v. Blackerby.

### (D) Of the Demeanor of Counsel &c.

1. THE counsel or attorney assigned to assist a pauper, either to prosecute or defend, may not refuse so to do, except he satisfy my Lord or the Master (who ordered the admission) with some good reason for such refusal. P. R. C. 267.

S. P. Curf. Canc. 489. cites Ord. Chan. 152.

2. The counsel who moves for a pauper ought to have the order of admittance with him, and to move for him before he makes any other motion. P. R. C. 267.

[ 263 ] S. P. Curf. Canc. 489. cites Ord. Chan. 152.

—And that hinders not, but that he may have another motion, or as many as he might have without it. P. R. C. 267.—S. P. Curf. Canc. 489.

3. If the register finds that any, for whom a counsel moves as a pauper, was not admitted in forma pauperis, he shall not draw out the second motion of such counsel; but the fruit of it shall be lost for his abuse to the Court in the other. P. R. C. 268.

S. P. Curf. Canc. 489. cites Ord. Chan. 153.

S. P. Curf.  
Canc. 489.

4. All *masters, counsellors, officers, ministers, clerks and solicitors* in the Court are to *observe these rules* in favour of paupers. P. R. C. 268.

5. The *admission* must always be *produced in the office* where the pauper has occasion to pass. P. R. C. 268.—S. P. but this seems not now so strictly necessary. Curf. Canc. 489.

[For more of *Paupeet* in general, see *Ponsuit (P)* pl. 4. l. 2. and the Notes there, and other proper Titles.]

## Pawn.

See (C)  
pl. 1.

(A) *What.* As to the Interest of Pawnee or Pawnor; *and how considered.*

S. P. Be-  
cause *nei-  
ther of them  
has the ab-  
solute pro-  
perty* in the

goods so gaged; per Doderidge J. 3 Bulf. 17. Hill. 12 Jac. in Case of Waller v. Hanger.—But the King may redeem by paying the *money*. Yelv. 178. cites 13 R. 2. 31. Br. 31. & 22 E. 4. 10. & 26 H. 6. Fitzh. Barr.

Pledging does not make an absolute property, but is a delivery only till payment &c. and may be re-demanded at any time upon payment of the money; for it is delivered *only as a security for the money lent*; and there is a *difference between mortgaging of land and pledging of goods*; for the mortgagee has an absolute interest in the land, whereas the other has but a special property in the goods, to detain them for his security; per Fleming Ch. J. & al. Cro. J. 245. in Case of Sir J. Ratcliff v. Davies.

The delivery is nothing but the bare custody, and it is not like to a mortgage; for there he that has interest ought to have the money; but in the case of a pledge, it is only a special property in him that takes it, and the general property continues in the first owner; per Fleming Ch. J. *quod non fuit negatum*. Yelv. 178. S. C.

\* S. P. Br.  
Pledges, pl.  
20. cites  
S. C. be-  
cause he  
had not pos-  
session of it  
before.

S. P. Yelv.  
178. Arg.  
cites 22 E.  
4. 11.—

2. *A pledge cannot be but where the thing is delivered by command of the other to take it, and at the same time, and this is properly a pledge; but if a man commands another to take and retain it till he be satisfied of such a debt, this is \* no pledge.* Per Brian Ch. J. and this diversity was granted by the Court. Br. Trefpals, pl. 271. cites 5 H. 7. 1.

3. If a man delivers goods in pledge for 40 l. borrowed, and after the debtor is convicted in 100 l. in debt to another, those goods shall

shall not be put in \* execution till the 40 l. be paid; for the creditor has interest in it. Br. Pledges, pl. 28. cites 34 H. 8.

As lease of land, and stock of sheep for

years, shall not be put in execution during the lease. Br. Pledges, pl. 28. cites 22 E. 4. 10.

4. He who has goods at pawn has a *special property* in them, so that he may *work* such pawn if it be a *horse* or *ox*, or may take the *cow's milk*, and may use it in such a manner as the owner would; but if he *misuses* the pawn an action lies; and he has such interest in the pawn, as he may *assign* it over, and the assignee shall be subject to a *detinue* if he detains it on payment of the money by the owner. Owen 124. Mich. 7 Jac. C. B. Moor v. Conham.

S. P. 2 Salk. 522. Pasch. 5 W. & M. Anon.

5. Upon the *tender* of the money secur'd by the pawn, by the pawnor or his executor, the *property* notwithstanding the refusal, is *reduc'd* instantly to the pawnor &c. without claim; but per Curiam, the executor shall have \* debt for the money against the pawnor; for upon the redemption it remains a duty. Yelv. 178. Trin. 8 Jac. B. R. Sir J. Ratcliff v. Davies.

1 Bulf. 30. S. C. — And he may bring *trover* and *conversion* for them. Arg. Roll. R. 60. says it was

so adjudged in Ch. J. Fleming's time. — It was so held, Cro. J. 245. Ratcliff v. Davis. — Upon tender of the money, and refusal to deliver the pawn, an action of trespass on the case lies; per Doderidge J. 2 Bulf. 309. in Case of Isaac v. Clark. — \* The Reporter adds a quære, and says, Mirum mihi, in as much as there never was any contract for the money between the parties. Yelv. 179.

## (B) Redemption. At what Time; and on what Terms.

1. **W**Here no time of redempcion of a pawn is agreed, he that pawns may *redeem* during his life; but his executor cannot *redeem*; for it is a condition personal. Yelv. 178. Trin. 8 Jac. B. R. Ratcliff v. Davis.

Cro. J. 244. S. C. that it may be redeemed after the death of the pawnor. 3 Salk. 267.

pawnee, but not of the pawnor. —

2. A man pawns goods, and after is *outlawed*; during this his outlawry he cannot *redeem* them; per Williams J. 1 Bulf. 29. Trin. 8 Jac. Ratcliff v. Davis.

Yelv. 178. S. C.

3. A pawn'd jewels of 600 l. value for 200 l. to B. and takes a note acknowledging the jewels to be in B.'s hands for securing 200 l. and afterwards A. borrows more money on several notes, without taking notice of the jewels, and dies. Executors brought a bill to *redeem* on payment of 200 l. But Cowper C. decreed *payment of the notes, as well as the 200 l.* the day of payment being lapsed; but Mr. Vernon said, if there had been any *bond-creditors*, or a *commission* of bankruptcy against A. the notes must be *postponed*, and B. could not have tack'd them to the pawn. Mich. 1715. Ch. Prec. 420. Demandray v. Metcalf.

G. Equ. R. 104. Trin. 1 Geo. S. C. and is only a copy of the other.

(C) Redemption. *Where the Pawn is transferr'd or delivered over.*

Noy. 137. 1. **T**Hough the person that takes the pawn delivers it over to a stranger, yet if *pawnee dies*, the *tender of the money* must be to his executor, and not to the stranger; for the delivery makes but naked custody of it; and if the *delivery* had been *\* on consideration*, it does not alter the case; for the stranger is not privy to the first contract of pawning, nor to the condition, and so not like to a mortgage; and in case of a pawn there is only a *special property* in the pawnee, and the general property continues in the first owner. Yelv. 178. Trin. 8 Jac. Sir J. Ratcliff v. Davis.

S. C. —  
Cro J. 244.  
Trin. 12  
[ 265 ]  
Jac. B. R.  
S. C. —  
\* Contra  
per Fleming  
Ch. J.  
Bulf. 30,  
31. S. C. —  
The tender  
must be  
made to the bailee, and not to the executor of pawnee; per Fleming Ch. J. 1 Bulf. 31. Trin. 8 Jac. Ratcliff v. Davis.

Trin. 1728. 2. A. pawns jewels to B.—B. *pawns them over to C. for a greater sum*, and after B. borrows *more money of C. on promissory notes*; if A. will redeem he must pay C. all the money borrowed on the notes by B. as well as the money for which B. pawn'd them to C. *Quære tamen*. 2 Vern. 691. Trin. 1715. Demainbray v. Metcalf and Knight, & al.—Ibid. 698. S. C. Decreed. Mich. 1715.

Abr. Equ.  
Cases 0.  
S. C. cited  
in Case of  
Sir Justus  
Beck. —  
S. C. Abr.  
Equ. Cases  
324.

(D) Redemption. *Of Deeds pawned.*

1. **A** Trust of a term for raising younger children's portions was discharged all but 200l. to M. who was one of the daughters, and of whom the heir at law borrowed 500l. and left the deed of trust in her hands as a pawn for securing the 500l. and 200l. and died, leaving four daughters his heirs, who bring their bill against the pawnee, and the executors of the surviving trustees to deliver the deed, and assign the term, which was *decreed on payment of the 700l.* Fin. R. 10. Mich. 25 Car. 2. Fitzjames v. Fitzjames.

(E) Redemption. *Where Goods are pawned by one that is not Owner.*

1. **I**F a man finds the goods of another man, and pledges them for money, the owner may retake them. Br. Pledges, pl. 28. cites 35 H. 6. 25. Simon Eyre's Case.

2. A country clothier sends cloths to his *London factor* to sell.  
Factor

Factor pawns them. Pawnee by answer admits factor pawn'd some cloths, but knows not if they were the plaintiff's; ordered that the clothier in the presence of two or more might have the view of them, which was that the plaintiff might be thereby enabled to bring an action at law. Vern. 407. Mich. 1686. Mariden v. Panthall.

(F) *How it may be used. And in what Cases it may be sold.*

1. **WHEN** a man hath a *special interest* in a thing by act in law, he cannot work or otherwise use it; but where he has it by act of the party, he may; as in case of a pawn; per two Justices. Owen 124. Mich. 7 Jac. C. B. Moor v. Conham. See (A) pl. 1. marg.— If the pawn be of somewhat which will be the worse for wearing, as cloaths &c. the pawnee cannot use it. But if it be somewhat that will not be the worse for wearing &c. as jewels &c. the pawnee may use them, but then it must be at his peril; for if the pawnee is robbed in wearing them, he is answerable; and the reason is, because the pawn is so far in the nature of a depositum, that it cannot be used, but at the peril of the pawnee; and the using occasioned the loss. But if the pawn is laid up, and the pawnee is robbed, the pawnee is not answerable. Also if the pawn be of such a nature that the keeping it is of charge to the pawnee, as if it be a cow or a horse, the pawnee may milk the cow or ride the horse; and this is in recompence of the keeping. 2 Salk. 522. Pafch. 5 W. & M. B. R. Anon. [ 266 ]

2. Where goods are pawned *redeemable at a day certain*, the pawnee in case of failure of payment at the day may sell them. 3 Salk. 267. pl. 2.

3. A. borrowed money of B. and for a security *absolutely transferred an Exchequer annuity defeasanced to be void on payment such a day*. After the day B. demanded the money frequently, and gave notice that he would sell at such a time, and that A. might be present to see it sold at the full value. A. desired forbearance. B. died, and his administrator sold it by a sworn broker for the full value at that time, tho' afterwards they rose in value. A. prayed redemption, or to compel the purchase of another like annuity to be transferred in lieu of it. And so it was decreed by Ld. C. Harcourt. But upon appeal to the House of Lords, setting out the circumstances of the case, as that such annuities were usually sold as well as stocks at the exchange, and that it was but a pawn, that the request of forbearance was a submitting to the sale after that time, that among merchants, after day of payment past, they were taken as ready money, that it would occasion multiplicity of suits in like cases, and that this being the case of an administrator, who was obliged to dispose of the assets to pay debts and legacies, it was the stronger; the decree was reversed, nemine contradicente, Wms's Rep. 261. Trin. 1714. Tucker v. Wilson.

(G) *Lost or Damaged.*

But see that, per Fleming Ch. J. if a man takes bona peritura as a pawn, at his own peril be it, if he cannot re-deliver them again on tender and payment of the money borrowed. 1 Balf. 30. Ratcliff v. Davis.

1. IF the pawn be of a *perishable nature*, as oil, corn &c. and no time of redemption limited, the loss will be to the pawner if the goods perish naturally, and the pawnee will have *debt* for his money, and the other no remedy for his pawn. Yelv. 179. per Fleming Ch. J. and not denied, in Case of Ratcliff v. Davis.

4 Rep. 83. b. in Southcote's Case. —But if the pawnor tendered the money before the stealing, and the other refused to deliver them, then pawnee shall be charged. Co. Litt. 89.—S. P. For now his property is determined, and he is a wrongful detainer, and he that keeps goods by wrong must answer for them at his peril at all events; for his detainer is the reason of his loss. 2 Salk. 523. Trin. 2 Annæ B. R. Coggs v. Bernard.—Roll. R. 129;—\* Co. Litt. S. 123. 89.—4 Rep. 83. b. in Southcote's Case.

2. If the pawn is laid up, and the *pawnee is robb'd*, the pawnee is not answerable, but if he wears them, \* he is answerable for the loss. 2 Salk. 522. Pasch. 5 W. & M. B. R. Anon.—He may indict the robbers for taking the goods; for he has property against all strangers. See Kelw. 70. b. pl. 7. Mich. 21 H. 7.

3. If a *creditor* takes a pawn, he is bound to restore it on payment of the debt; but if his care in keeping it be exact, and the pawn is lost, he shall be excused; for there is no default in him. 2 Salk. 523. Anon.

4. If the pawn be lost, *the pawnee has still his remedy for the money*; for the law requires nothing extraordinary of the pawnee, but only to use an ordinary care for the restoring of the goods. 2 Salk. 523. Anon.

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(H) *Actions, Prosecutions, and Pleadings.*

Jenk. 83. pl. 61. cites 35 H. 6. 35. but this seems misprinted (35) for (25).

1. INFORMATION was made in the Exchequer by J. B. *that the King was possessed of a jewel at W. and shewed what, which was in the keeping of N. P. warden of the jewels of the King such a day and year; and that after such a day and year in London, it came to the hands of S. E. and process issued against him, who came and said that the city of London is an ancient city, and has been time out of mind, in which there has been a custom time out of mind, that if any put goods in pledge for any duty whatsoever, that he who receives it shall retain it till he be satisfied of the debt, by which &c. and that O. R. was possessed, and the day and year in the information, delivered the goods in pledge to the defendant for 60l. borrowed of him; absque hoc, that the jewel came to his hands in any other manner, and said that the sum is not yet paid, & hoc &c.* and

and said by protestation that the property was not in the King, nor was it signed with the print or arms of the King, and the King demurred in judgment; and upon long argument it was held by the best opinion that the custom is not good; for it cannot have lawful commencement, and if it was good between subjects, yet it shall not bind the King; and after it was agreed in the Exchequer that the King shall be restored, and process by capias awarded against the defendant. Br. Customs, pl. 5. cites 35 H. 6. 25.

2. In debt, the defendant said that he has infeofed him of certain land in pledge, and if he will re-inseoff him he is ready, and always has been to pay him; and the best opinion was, that it is a good plea; but several were of opinion, that where contract is simple at the commencement, and after pledge is given for the debt, that it shall not be pleaded in debt, that the plaintiff has pledge'd &c. Contra where pledge is deliver'd for the debt at the making of the contract; for in the other case, the one shall have debt, and the other the detinue of the goods; contra where it is given in pledge at the making of the contract. Br. Dette, pl. 111. cites 9 E. 4. 25.

Br. Pledges,  
pl. 10. cites  
S. C.

3. Debt for 200l. and counted that the defendant delivered silks to him to sell, meliore modo quo poterit at his pleasure, and so much as he might receive for the silks, to retain for the 200l. in satisfaction &c. and so much as should remain, the defendant should pay to him; and that he sold for 150l. and for 50l. which remained he brought his action. Pigot said, A. B. offered you 200l. for the silks, and you refused; and yet, per Cat. and Brian, this is no plea; for the plaintiff had authority to sell them at his pleasure, and if he had sold them for 12d. tho' they were worth 1000l. the defendant has no remedy; but Brooke says, it seems to him that this is not reason; for he was to sell them meliore modo quo poterit, which is, for the best price. Br. Dette, pl. 164. cites 18 E. 4. 5.

4. Trespass by A. against B. of a chain of gold taken, the defendant said that the plaintiff, before the taking, licenced him to take the chain, and retain it in pledge till 100 marks which he owed to him were paid, by which licence he took it, judgment &c. Keble demurred for three causes, 1st. Because he pleaded licence, and it appeared by his own plea that he took it as a pledge, by which he ought to say, that he took it as a pledge, and that the plaintiff impignoravit &c. and not quod licenciavit. But to this it was said, that he cannot take it as a pledge, because he had not possession thereof before, but that he may take it and retain it quousque &c. Per Brian Ch. J. a pledge cannot be but where the thing is delivered by command of the other to take it, and at the same time, and this is properly a pledge. But if a man commands another to take and retain it till he be satisfied of such a debt, this is no pledge, and this diversity was granted per Cur. and so it seems the plea good as to this. Keble insisted, 2dly, Because it is not alleged, for what cause the debt was due; and per Townsend and Davers justices the debt is not traversable. And 3dly, Because

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the defendant did not say that the 100 marks were not paid at the time when he took the chain, and as to this the defendant amended his plea &c. et adjournatur. Br. Trespass, pl. 271. cites 5 H. 7. 1. Ld Dudley v. Ld Powis.

5. In trespass of goods taken the defendant pleaded how he by accord of the plaintiff detained them in pledge for 10l. which the plaintiff ow'd him, and did not shew cause of the debt; and well. Br. Pledges, pl. 13. cites 21 H. 7. 13.

A. was indicted in Middlesex, for being a pawn-broker, and it was moved to quash it, for that this indictment was in nature of an action of trover; for it was,

6. 1 Jac. 1. cap. 21. The sale of goods wrongfully gotten to any broker, in London, Westminster, Southwark, or within 2 miles of London, shall not alter the property thereof.

If a broker, having received such goods, shall not upon the request of the true owner, truly discover them, how and when he came by them, and to whom they are conveyed, he shall forfeit the double value thereof to the said owner.

This act shall not prejudice the ancient trade of brokers in London, being selected and sworn for that purpose; it being only intended against fripers and pawn-takers, who for the most part keep open shop.

was, that the defendant on such a day &c. had lent M. the wife of T. S. 2s. 6d. and at the same time did receive of her an under petticoat of silk, as a pawn for the re-payment of the money, and that he (the defendant) had illicit & deceptive refused to deliver the said petticoat, notwithstanding that the said M. had tender'd to him the said 2s. 6d. with interest for the same, ad damnum of the said T. S. and in malum exemplum &c. so that at most this is only a breach of contract, which is actionable, but not indictable. But the Court (absente Holt Ch. J.) would not quash the indictment, because of the abuse by pawn-brokers. Sed quære; for if the defendant had demurred to this indictment, it could not have been maintained by law. Carth. 277. Pasch. 5 W. & M. B. R. The King v. Gallwich.

If the pawn-broker on tender of the money refuses to re-deliver the goods pledg'd, he may be indicted, for being secretly pawn'd, it may be impossible to prove a delivery in trover for want of witnesses; per Holt and Eyre J. 2 Salk. 522. Pasch. 5 W. & M. Anon.

7. A pawn-broker's servant took a pawn; the pawner came and tenders the money to the servant; he said he had lost the goods. On this pawner brought trover against the master; and per Holt Ch. J. trover lies. 2 Salk. 441. Mich. 10 W. 3. Jones v. Hart at Guildhall.

8. If I pawn goods to A. for such a sum, A. may have debt for the money notwithstanding his having a pawn; per Holt Ch. J. at Nisi Prius. 12 Mod. 564. Mich. 13 W. 3. Anon.

[For more of Pawn in general, see Bailment, Property, and other proper Titles.]

Pawnage.

(A) *What it is. And what passes by the Grant of it.*

1. **P**Awnage is the profit of acorns, nuts, hawes, hipps, floes and beech masts; per Welsh J. Quod Benlowes concessit, and said, that so it is of apples and crabbs. Quod Brown J. negavit, and said, that pannagium in the Exchequer is taken all one as herbageum. Mo. 46. pl. 139. Anon.

Pawnage or pannage, is that food which the swine feed upon in the woods; as masts of

beech, acorns &c. alimentum, quod in silvis colligunt pecora, ab arboribus dilapsum: also it is the money taken by the agitors for the feeding of hogs in the King's forest. Crompt. Jurisd. 155. Stat. West. 2. cap. 25. Manwood says, Pannage signifies most properly, the masts of the woods or hedge-rows. And Linwood thus defines it, Pannagium est pastus pecorum in nemoribus & in silvis, utpote de glandibus & aliis fructibus arborum silvestrum, quarum fructus aliter non solent colligi. It is mentioned in the Statute 20 Car. 2. c. 3. Jac. Law Dict. verb. Pannage. [ 269 ]

2. The Queen granted the custody of a park for life &c. cum omnibus proficuis & commoditatibus &c. to the said office belonging, to which the herbage and pawnage of the park appertains, and after grants the park to another and his heirs. The grantee cuts trees and carries them away, and it was held that this was injury done to the keeper, as to the herbage and pawnage, but not in respect of taking the trees; for which injury, the keeper is put to his remedy by assise or action on the case, and not by action of trespass, which does not lie. For if so, it would lie against him who had franktenement in possession for profit appendre; and therefore assise or action on the case lies for the trees. It seems that assise does not lie because he cannot have seisin of the pawnage of those trees being utterly taken away, and there is reason that he shall have action upon the case for his damage, but for the herbage he may have assise, for which action on the case does not lie. 2 And. 7. Anon.

3. A. by deed grants herbageum & pannagium within his lands rendering rent, and after the grantor cuts the trees. Dyer Ch. J. thought the grantee could not bring trespass, nor could hinder the cutting them, but that he might have assise; for it is proficuum in certo loco capiend. As of estovers, if he cuts the trees assise lies, and he shall not disturb him; for he has no interest in the trees. Mo. 46. pl. 139, Mich. 5 Eliz. Anon.

4. By the grant of pannagium, hogs may eat the grafs; but if a man grant his acorns, the grantee must gather them; and where pannagium is granted, the grantee may put in his hogs into

into the place granted. Sic dictum fuit. Ow. 35. Mich. 13 & 14 Eliz. Anon.

[For more of Pawnage in general, see *Manwood of Forest* *Latro verbo Pannage*; and see *Common, Forest*, and other proper Titles.]

## Payment.

### (A) Good. In respect of the Thing paid or given.

So another bill taken in the same manner, and the taker owing the banker 5l. had it indors'd on the back of the bill as paid, this was held by Pemberton Ch. J. a negotiating,

1. A. Being indebted to B. takes a receipt of B. in his (A.'s) books, and goes with B. to C. a banker; the banker asks B. if he would have money or notes; B. says he must pay it away, and so takes 2 notes payable to the persons he was to pay it to, and receives of the banker 7s. overplus, and *within 3 hours after the banker breaks*. It was agreed, if the banker had refused payment, A. had been chargeable notwithstanding the receipt in B.'s books, but here was a negotiation of this matter, which discharg'd A. and so B. became nonsuited at a trial before Pemberton Ch. J. 2 Show. 296. Pasch. 35 Car. 2. B. R. Vernon v. Boverie.

12 Mod. 303. S. C.

2. A. sells goods to B. and *B. is to give a bill in satisfaction*. B. is discharged tho' the bill is never paid; for the bill is payment. But otherwise a bill should never discharge a *precedent debt* or *contract*; but if *part be received*, it shall only be a discharge of the old debt for so much. 1 Salk. 124. 3 W. & M. Clark v. Mundall.

And if a man upon a contract made before, take such a bill and keep it 'till the party on

whom it is drawn becomes insolvent, in an action brought by him against the buyer upon that bill, he shall be barred; but he shall recover the debt upon the original contract; per Holt Ch. J. 12 Mod. 408. Anon.

3. If a man contracts for goods, and after his carrying them away gives the seller a *goldsmith's note* for the money, it does not amount to a payment; but if it were given *at the very time of the contract*, it would be *prima facie* evidence that it was taken in payment; per Holt Ch. J. 12 Mod. 408. Trin. 12 W. 3. Anon.

4. If A. buy a thing of B. and gives him a *goldsmith's bill* in payment, which *vendor accepts without exception*; if the goldsmith were *worth nothing*, and A. does not *know it*, it is a good payment; *secus* if A. knew him to be in a failing condition; per Holt Ch. J. 12 Mod. 517. Pasch. 13 W. 3. Anon.

5. If A. owes B. money, and he gives him a *goldsmith's note* in payment, the debt is not discharged 'till B. receives the money, if there be not *default* in him that it was not paid, or if he does not at the receipt of the note give an *acquittance for the debt* to A. Per Holt Ch. J. 12 Mod. 521. Pasch. 13 W. 3. Ward v. Sir Peter Evans.

But if B. had an election to receive the money or a goldsmith's note, and he chose the note, it may

be otherwise; and more especially if he gives up his former security that he had for the original debt; per Holt Ch. J. 12 Mod. 521.

6. If A. and B. be two *goldsmiths*, and B. gives a note to C. for 100l. A. gets possession of it, and brings it to B. and takes a new note for it, giving up his former, it is no payment; per Holt Ch. J. 12 Mod. 521. in Case of Ward v. Sir Peter Evans.

7. *Bond for a simple contract* is not payment of the original debt, but is a thing of an higher nature which extinguishes the debt; per Holt Ch. J. 12 Mod. 538. Trin. 13 W. 3. in Case of May v. King.

8. The Court held, that a *goldsmith's note* is no payment, being only paper, and received conditionally (if paid) and not otherwise, *without an express agreement* to be taken as cash. 2 Salk. 442. Hill. 2 Ann. B. R. Ward v. Evans.

6 Mod. 36. S. C. — 3 Salk. 118. S. C. — Upon a general tak-

ing, he that takes such notes shall bear the loss, unless he that gives the bill warrants it for a certain time; for then it is at his hazard during the time; per Ld. Wright. Chan. Prec. 200. Trin. 1702. Crowther v. Crawley.

9. The party receiving a *goldsmith's note* shall have a reasonable time to receive the money, and is not obliged as soon as he receives it to go immediately for the money. 2 Salk. 442. Hill. 2 Annæ B. R. Ward v. Evans.

A \* bill of exchange, or goldsmith's note, is not payment, unless the

party omits receiving of it in a reasonable time, as 3 days, when he might have received it; but if he gives a receipt and accepts the note as payment, this shall bind him; per Holt Ch. J. 11 Mod. 87. Trin. 5 Annæ B. R. Sir Charles Thorold v. Smith. — \* S. P. Ibid. 72. in S. C.

11 Mod.

10. Payment of *base money* in Ireland is no discharge, the proviso being for payment of money in *silver*. MS. Tab. cites 20 March 1720. Bath v. Conley.

(B) Good; in respect of the *Person to, or by, whom*.

See Master and Servant (D).

1. *THREE* covenant jointly and severally, and the plaintiff declares *quod defendens non solvit*, without saying (nor any of the others), and yet it was held well, because the action was not brought against them all, in which case it would have been otherwise; and if any of the others had paid it, the defendant might properly have pleaded it; so it is in debt upon an obligation,

[ 271 ]

tion, where two are bound jointly and severally. Noy. 75. in Case of CONSTABLE AND CLOWBURY, cites 15 E. 3.

2. In debt upon an obligation, the condition was *to pay to the obligee, and others the parishioners of D.* 201. at the feast of N. The defendant pleads, that he paid it to the obligee, and J. S. and R. K. others of the parishioners of the parish; the plaintiff replies, that J. S. and R. K. were not all the parishioners of the said parish. But Dyer and Welch held the replication was ill; for it is not requisite that the payment should be to all the parishioners; because the condition is not so; but if he *pays it to two of the parishioners*, it is sufficient. Mo. 68. pl. 183. Trin. 6 Eliz. Anon.

3. Feoffment on condition to pay 10l. to the feoffee, his executors and assigns, within three years, that then &c. Feoffee has issue three sons, whom he makes his executors, and dies before day of payment; the Ordinary grants *administration to J. S. during the minority of the executors*; per Dyer, it is the surest way to pay the money to the executors, notwithstanding the administration; for the administrator in such cases is but a bailiff or receiver to the executors, and accountable to them, which Harper concessit; and per Cur. if the monies be paid to *one of the executors, it is sufficient.* 4 Le. 100. temp. Eliz. Anon.

But where a wife, who usually received and paid money, received money due on bond; and the husband got judgment on the bond; it was ordered, that he acknowledge satisfaction. Chan. Cases 38. Mich. 15 Car. 2. Seaborne v. Blackstone.

4. In debt upon a bond upon condition to stand to the award of J. S. the defendant pleaded, that the said J. S. had arbitrated that the defendant should pay to the plaintiff 10 l. and he said, he had paid it to the plaintiff's *wife*, and that she *receiv'd it*; upon which the plaintiff demurr'd; and judgment was given for the plaintiff. Le. 320. Trin. 31 Eliz. B. R. Frond v. Batts.

In debt upon bond to plaintiff's *wives*, the declaration averr'd, that the money was not paid to the said *wives* before the co-venture &c.

5. An award was for the defendant *to pay to the plaintiff and another*; in debt for non-performance the declaration said, that defendant *had not paid to the plaintiff.* Per Glyn Ch. J. If I am bound to pay money to two, I can pay it actually but to one; for I cannot pay one and the same sum to two several persons at one and the same time; and afterwards, in the same term, the Court gave their judgment, that it was good cause to demur generally. 2 Sid. 41. Mich. 1657. Rot. 79. Abbot v. Bishop.

And it was objected, that it was not said, *nec alicui eorum*; for it might be paid to one of them; but the Court held, that would have been superfluous, and that it was sufficient without it; for payment to one of them is payment to all the obligees. Noy. 69. Warner & Stone & Ur.

6. In trover it appear'd, that the plaintiff's *son had a general authority from his father to receive and pay out his father's money*; the son took a bill for money due to his father; and *received it without a particular authority* for that purpose, with an intent to embezzle and spend it, but gave a receipt as for money had to his father's use, and the money was given to the defendant. Holt Ch. J. held that the action was maintainable by the father; for

for the general authority which the son had to take his father's money, made the receipt of the money to be to his father's use, and a good discharge of the debt, so as that the father could not avoid the payment, and charge the person that paid the money with an action, consequently it became the father's money, the son, into whose possession it was given, being to this purpose as his father's servant. Salk. 289. coram Holt Ch. J. at Nisi Prius. Anon.

7. He that has *power to sell*, has power to receive the money; for if a man give power to his servant to sell his horse, he impliedly gives him power to receive the money; and payment to such servant is payment to the owner. Per Holt. 12 Mod. 230. in C. B. Mich. 10 W. 3. Anon.

8. Payment to the *Treasurer of Gray's-Inn &c.* is payment to the House; as payment to the *Chamberlain of London* is payment to the City. 12 Mod. 413. Trin. 12 W. 3. in Cafe of Levins v. Randall. [ 272 ]

(C) Good. In respect of the Person to whom.  
*A Stranger.*

1. IF a *scrivener* is employed generally to put money to use for a year, and the money is paid to the scrivener, who *breaks* or does not pay the money, the payment does not excuse the party; but if he receives it by special command, that is a good cause of equity. Hetl. 45. Mich. 3 Car. C. B. Anon. Money paid to the scrivener of the mortgagee is good payment. MS. Tab. 20 November.

1702. Sharp v. Thomas.—A man intrusts a *scrivener* to put out his money, he takes bond for it, and afterwards delivered the bond to the obligee, but receives the interest from time to time, and afterwards called in the principal; and the obligor paid the principal to the scrivener, and took a note from him to deliver up the bond (he having it not when the money was paid in) then the scrivener writes to the obligee to send him the bond, which he accordingly does, but takes the scrivener's note, either to deliver back the bond or pay the money; before the money paid, the scrivener breaks, and the obligee for a little money gets back the bond from the scrivener's clerk, and puts it into suit; and this bill was brought by the obligor to be relieved, and have the bond delivered up, which was decreed accordingly with costs; for the Court held, that from the time the bond came into the scrivener's hands, he was trustee for the obligor (the money being paid); and it is plain the obligee trusted the scrivener, not only with putting out his money, but with the custody of his security. Pasch. 1671. Abr. Equ. Cafes 144. Abington v. Orme.—Order'd the bond to be cancell'd. Toth. 273. Hill. 20 Jac. Huet v. De-la-Fontaine.

2. If a judgment is given in debt, and the money is paid to the attorney of the plaintiff, though the money miscarry with the attorney, yet the payment is good. Het. 46. Mich. 3 Car. C. B. Anon. But payment to the sheriff on a ca. sa. is not good; though on a v. Morton.

¶ *sa.* some think it would be good. 2 Show. 139. Mich. 32 Car. 2. B.R. ....

3. Payment of interest of a mortgage to *scrivener* is good if he has the bond or mortgage deed; so of principal if he deliver up the bond; otherwise of mortgage deed as to the principal; because there must be a re-conveyance. But if mortgagee agree, it is well during mortgagee's life, though he has neither bond nor mort- 2 Chan. Cafes 77. Arg.—A scrivener puts out B's money upon bond to C.

and afterwards pays part of the principal money to the *serviener*, who gave a receipt; but the bond being in B.'s custody, the payment was not good. Vern. 150. Hill. 1682. *Roberts v. Mathews*.—\* Chan. Cases 93. Mich. 19 Car. 2. S. P. Hen v. Conifby.—S. P. Ibid. 111. Trin. 20 Car. 2. Dey v. Olfaston.—If obligor takes not up the bond when he pays, and the obligee gets the bond, and so has remedy at law, there the *debtor trusts the serviener*. Arg. 2 Chan. Cases 77. Mich. 33 Car. 2. Taulurer v. Ward.—† Chan. Prec. 209. Mich. 1702. Martin v. Kingfley.

## (D) Good. In respect of the Manner, Fraud, Artifice &c.

For though the money was actually paid, and so the condition performed in words, yet [ 273 ] that circumstance will make it to be no payment nor performance in law.

Cro. E. 383.

Paſch. 37 Eliz. B. R. Goodale v. Wyatt. S. C.—And estates of third persons shall not be devised by colourable or covenous payments, but by true and effectual payments. 5 Rep. 96. S. C.—Poph. 99. S. C. for it was not done *animo solvendi*.—Godb. 299. cites it as Packington's Case.

1. A. Makes a feoffment to B. upon condition, that if A. within a year after the death of B. shall pay 100 l. to the heirs or executors of B. that A. may re-enter. B. makes a feoffment of the land to C.—B. makes his will, and his wife and heir his executors, and dies; A. within a year after the death of B. by agreement with the heir of B. at a time and place limited for the payment pays the 100 l. to him; and by the said agreement A. is immediately to have back 30 l. of this 100 l. which is done accordingly; adjudg'd and affirm'd in error, that this colourable payment is not sufficient to revest the estate in A. for it is not a payment of the 100 l. but of 70 l. only. Jenk. 261. pl. 61. Goodal's Case.

2. It was held, that if colourable payment of money by a purchaser is recited when none was paid revera, this estate is invalid against him that comes in bona-fide for a valuable consideration, and this may be given in evidence well enough without pleading it, Clayt. 32. Aug. 11 Car. Ballard v. Sitwell.

3. A. having notice of a decree to which he was no party, pays contrary to that decree; it was order'd, that he should pay the money over again. Vern. 57. 122. Hill. 1682. Harvey v. Mountague.—This notice was only by being present in Court when the decree was pronounc'd. Ibid.

\* 6 Mod.

147. Poppley v. Ashley. But if A. goes to buy goods of D. and offers a note of a declining goldsmith

in payment, and D. says I will take it, if it be a good man, tho' he then knew him to be otherwise, that will not be good payment. Per Holt. Farr. 139. in Case of Hopkins v. Gery.

4. A. has notes of B. a goldsmith, and knows B. to be in a declining condition; C. comes to A. to demand money due; A. asks C. if he will take B.'s notes in payment; C. is willing to take it, and A. pays it him. Holt doubted if this was not a good payment, because here was no artifice or surprise used. Farr. 139. Hill. 1 Ann. B. R. Hopkins v. Gery.

5. If a banker or goldsmith, who has many people's money, will refuse payment, but keeps his shop open, and as often as he is arrested,

*arrested, gives bail, he may by that means give preference of payment to his friends; and when he has done, if he runs away, yet such payment shall stand against a commission of bankruptcy.* Per Holt Ch. J. Farr. 139. Hill. 1 Ann. B. R. in Case of Hopkins v. Gery.

6. A. bequeaths a *legacy* to M. the wife of J. S. who assigns it in trust for his children, and after he devised it by his will likewise, for the benefit of his children, and made M. his wife executrix, who *compounds with A.'s executor, and accepts 200 l. in full for 300 l.* Decreed that the executor of A. stand charged to the children for the other 100 l. Mich. 1 Geo. G. Equ. R. 89. Atkins v. Dawbury.

(E) Good. *What amounts to a Payment.*

1. **I** F a *feoffment in fee* be made on condition to pay 100 l. on such a day, and at the day the feoffees *make an obligation* to feoffor for payment of it, the same is no performance of the condition. Le. 112. 1 Pasch. 30 Eliz. C. B. in Case of Stamp v. Hutchins.

2. A. paid B. 100 l. in redemption of a mortgage; B. bids C. put it into his closet, which C. did: then A. demanded his writings, which B. refused to deliver; whereupon A. *required his money again*; B. bid C. fetch it, to deliver it back to A. which C. did, and turned it out on the table for A. to take it in presence of B. This was a good payment of the mortgage; but A. retaking the money is accountable to B. for the money as B.'s own money. Cr. E. 614. Trin. 40 Eliz. B. R. Hewer v. Bartholomew.

3. The plaintiff sold goods to A. and the defendant, being there present, *promis'd that if A. did not pay &c. he would.* Afterwards the plaintiff accepted of A. a bond for all the sum due upon the contract; and after a verdict for the plaintiff, this was moved in arrest of judgment; for that by the bond the contract was determined and discharged; and by consequence the assumpsit of the defendant, which depended upon it: and accordingly the Court was for arresting the judgment, for that it is *all one as if A. had paid it, or the plaintiff had released it*; but it being shewn that the bond was part of the first contract, and consequently that the contract was not destroyed by it, judgment was given for the plaintiff. Noy 140. Oldfield's Case. [ 274 ]

4. A. brought 100 l. to pay to B.—C. who was B.'s daughter, *snatch'd 20 l. out of the 100 l. and went away with it.* A. shall not be chargeable with the 20 l. till he shall recover the same of the daughter; and an injunction was granted accordingly. Chan. R. 68. 9 Car. 1. Plomer v. Plomer.

5. *Giving security* for purchase money is payment; admitted. Chan. Cases 99: Hill. 19 & 20 Car. 2. Sir Joseph Douglas v. Wade.

6. 950 l. is to be paid by vendee to vendor; vendee, by vendor's

dor's order, pays 500l. part to a bond creditor, and takes an assignment to himself of the bond, and likewise pays other money to other creditors by vendor's order, but took security for repayment, on certain conditions. Decreed to be *no payment* to the vendor, so long as the assignment of the bond, and the security for repayment, were kept on foot, and not delivered up to be cancell'd. Fin. R. 84. Hill. 25 Car. 2. Magfon and Sitwell v. Eane, Clayton & al.

7. A note drawn on A. to pay money for *value received* is a good discharge of a debt, tho' the note be not paid, unless the creditor return the bill in convenient time. Per Holt Ch. J. Show 155. Pasch. 2 W. & M. Darrach v. Savage.

8. A. gives B. a bill of exchange on C. in payment of a former debt; this is not allowable as evidence on non assumpsit, unless paid; for a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so, 1 Salk. 124. 3 W. & M. coram Holt Ch. J. at Guildhall. Clark v. Mundall.

9. The plaintiff was indebted to the defendant upon two notes; and the defendant obtained judgment at law against him for the money; and then desiring the defendant's forbearance, he told him that if he would procure one Defoy to give him his note for the money, he would accept of it, and acknowledge satisfaction on the judgment, and deliver up the plaintiff's notes; and being to go forthwith out of England, he left the plaintiff's notes with his agent here, to be exchanged for Defoy's, in case the plaintiff procured them; and the plaintiff accordingly procured two notes, payable to the defendant, which he delivered to the defendant's agent, and took up his own notes, and the attorney at law staid all further proceedings, but would not acknowledge satisfaction on the judgment, having no orders for it from his client; and before Defoy paid any of the money he failed, and then the defendant proceeded at law on the judgment; whereupon the plaintiff brought this bill to be relieved, and suggested that he had discounted the money with Defoy, and made him satisfaction, but he made no proof of any such thing, and therefore at the hearing his bill was dismiss'd by the Master of the Rolls, and this decree was affirm'd by my Lord Keeper on appeal. Abr. Equ. Cases 146. Hill. 1700. Grubarr v. Gairand.

10. When a merchant draws a bill upon a correspondent, who accepts it, this is payment; for it makes him debtor to another person, who may bring his action. 10 Mod. 37. Trin. 10 Ann. B. R. Per Parker Ch. J. in Case of Louviere v. Laubray.

[ 275 ] (F) What amounts to a Payment. Retainer.

1. DEBT upon an obligation with condition that if the defendant grants to the plaintiff before Whitsontide the lease and farm of the mill of D. habend. &c. till 6 l. be paid, that then &c. and said that before Whitsontide the defendant leas'd to the plaintiff the mill for term of ten years, rendring such rent per ann. &c. and that the plaintiff should retain in his hands all the rent which should amount

*amount to 6l.* And per Needham, this is good, tho' the rent and farm were not in esse at the time of the obligation made, but the lease was made after; but Laicon contra, and that the retainer of the rent till the 6l. be paid, is as good as payment of the rent or grant to the plaintiff of the rent, till 6l. be paid; et adjournatur. Br. Condition, pl. 81. cites 37 H. 6. 26.

2. In prohibition the suggestion was, that the Queen, and all those whose estate &c. had us'd to pay to the rector of K. 2s. 4d. per ann. in satisfaction of *tithes*. In evidence it appeared that the Queen had the estate of the abbot of K. who was *owner of the land, and likewise rector* in fee in right of his abbey. And it was insisted that this did not prove the prescription, because neither the Abbot, nor the Queen who had his estate, could pay themselves. But the Court held otherwise; for that the unity of the inheritance of both was not a discharge in perpetuum of the tithes or modus. And if so, then the *retainer shall be said payment to himself*. Mo. 527. Mich. 40 & 41 Eliz. B. R. Chambers v. Hanbury.

S. C. cited Mo. 532. in Case of Benton v. Trot.

(G) Made; *How it may be. By Parcels.*

1. I N Case the plaintiff declared that the defendant, in consideration the plaintiff would forbear him a debt for a certain time, *promised to pay it at two several days*, and shewed which in certain. And it was mov'd in arrest of judgment, that it is *not mentioned by what portions* the debt was to be paid. Per Clench J. the defendant has liberty to pay it *in what portions he pleases*. But, per Gawdy, he ought to pay it *by equal portions*; as a rent reserv'd payable at two feasts, without saying by what portions it shall be paid. The Court agreed that the objection was not good cause to arrest the judgment. 3 Leon. 235. Mich. 32 Eliz. B. R. Brewin v. Mansfield.

(H) Made; *At what Time it ought to be.*

1. I F I *sell my horse* to you for 20l. you shall not have the horse *if you do not pay the money presently*; for tho' I am content that you shall have him for 20l. yet if it is not paid presently, *but another comes and gives me 20l. for him, and I accept it*, there the second shall have it, and not the first, who did not pay me. Per Carell Serj. which Fitzh. J. and Brudnel Ch. J. agreed. Br. Contract &c. pl. 15. cites 14 H. 8. 19.

*But if a future day of payment be agreed, then 'tis a good bargain, and the vendee has possession immediately; and*

the vendor shall have action at the day. Per Fitz. Br. Contract, pl. 15. cites 14 H. 8. 19.

2. *But if you are in the market and offer me a piece of cloth for 20s. and I agree, and as I am telling the money another comes and gives you 20s. for it, and you agree, yet I shall have the cloth;* [ 276 ] *But if I depart, and before my*  
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*return you sell the cloth to another, there I shall not have the cloth, because I did not pay presently, nor no day of payment was given between us.* Per Broke J. which Pollard J. agreed. Br. Contract, pl. 15. cites 14 H. 8. 19. *But otherwise it seems, if vendor had agreed to stay till the vendee had fetched the money from his house.* Br. Contract, pl. 15. cites 14 H. 8. 19.—*But if the vendor and vendee are agreed for 20 s. and the vendor delivers the cloth to the vendee, and he accepts it, this is a perfect bargain; and so see a diversity between a perfect bargain and a communication.* Per Broke J. Br. Contract, &c. pl. 15. cites 14 H. 8. 19.

3. *But sale of stuff for so much as J. N. shall arbitrate is a good contract, if he arbitrates what, &c. and if he will not arbitrate any sum, then the bargain is void; per Pollard, to which Brudnel Ch. J. agreed; and by him, if J. N. was present, and would not say, the bargain is void; but if he be absent, the bargain is good 'till J. N. refuses to say what shall be paid, and the party shall have reasonable time to move J. N. what he shall say &c. having regard to the distance of the place where he dwells.* Br. Contract &c. pl. 15. cites 14 H. 8. 19.

4. *And a man may sell his stuff for 10 l. upon condition that he shall have it again when he comes to Paul's, and by the performance &c. the bargain shall be void.* Per Pollard. Br. Contract &c. pl. 15. cites 14 H. 8. 19.

5. *And if a man tells his horse for 10 l. and accepts 1 d. in earnest, it is a good contract; and the vendee shall have the horse, and the other shall have an action for his money.* Per Brudnel Ch. J. Br. Contract, pl. 15. cites 14 H. 8. 19.

6. A difference was taken, *where a day of payment is limited, and where it is not: for in the first case the contract is good immediately, and an action lies for it without payment; but in the other case not.* As if a man buys of a draper twenty yards of cloth, the bargain is void unless the money is paid immediately; but if a day of payment be limited by the parties, in this case one shall have an action of debt, and the other an action of detinue. Hill. 28 H. 8. Dy. 30. pl. 203.

7. *If I in consideration of 10 l. to be paid at Michaelmas promise you a horse, it is no plea that the money is not paid.* Dy. 76. pl. 39. marg.—And says it has been often so adjudged.

8. There are four times of payment of rent: 1. *voluntary, and not satisfactory*; 2. *voluntary, and in some case satisfactory*, in some case not; 3. *legal and satisfactory absolutely, and not coercive*; 4. *legal, satisfactory, and coercive.* See 10 Rep. 127. b. Mich. 11 Jac. in Clunn's Case.

See Trial  
(C. 8.) pl.  
34.

### (I) Made. At what Time it may be,

A. promises to pay 100 l. to B. 25th of March, quando requisitus fuerit. A. is  
I. A Bond was to pay at, or before the 25th of March, and the obligor tender'd the money the 24th. And the question was, whether the bond was forfeited? Per Anderson Ch. J. If he had tender'd in the last instant of the 24th day, he had sav'd the obligation: for the word (*before*) continues the whole time

time from the date of the bond 'till the first instant of the 25th day; and where a man has liberty of time to do an act, he shall do it in the last instant of the time. But the other Justices were against him, and thought that the word (*before*) was to have no other construction, than that thereby the obligor might be admitted to pay it before the day, *by agreement of the obligee*. Quære; for it seems that is no more than the law allows. Mo. 122. pl. 266. Pasch. 25 Eliz. Anon.

not bound to pay this till the last hour of the day, and B. ought not to request it before; per Coke. Roll. R. 189. Pasch. 13

Jac. B. R. Hudson v. Barton.—Roll. makes a quære.

2. In debt upon *bond*, the condition was for payment of a sum at a certain day and place. The defendant pleaded payment at the day and place, according to the condition; and upon issue taken it was found that he paid it *before the day*, and at another place, *and the plaintiff accepted it*. And the defendant had judgment by the opinion of the whole Court; for \*payment before the day is *payment at the day*. Trin. 31 El. C. B. Cro. El. 142. Bond v. Richardson.

[ 277 ] Dy. 221. b. pl. 22. in marg. cites S. C. — And 198. S. C. — Mo. 267. S. C. — Ow. 45. S. C. —

1 Leon. 311. S. C. — Sav. 96. S. C. — \* Mo. 366. pl. 502. Anon. S. P. — Cro. J. 434. B. R. Holms v. Brocket. S. P. — Godb. 10. pl. 14. Mich. 24 El. C. B. S. P. But that it not being pleaded specially, but generally, that he paid it according to the condition, the jury must find against the defendant; for that the special matter would not prove the issue. And Dyer Ch. J. said that the plaintiff's counsel might have demurr'd to the evidence. — Dy. 222. b. pl. 22. S. P.

S. C. cited per Car. Mod. 346. in Case of MARTIN v. PRITCHARD. — And that because such issue would not end the matter, the plaintiff

3. In debt on bond, *defendant pleads payment before the day*, and issue being taken upon it, *it was found for the plaintiff*: but upon a writ of error the judgment was revers'd. For tho' if a verdict had been *for the defendant it would have been good*; because payment before the day is payment at the day; yet being found *for the plaintiff*, it is become \*an immaterial issue; for non-payment before the day, is no evidence of non-payment at the day; and it might be paid in the mean time. 10 Mod. 147. Hill. 11 Ann. B. R. Merryll v. Joffelyn.

might demur. Ibid. — \* Cro. Jac. 434. Hill. 14 Jac. B. R. Holms v. Brocket,

(K) Made, at what Time; where *the Day is uncertainly expressed*.

1. A Bond was to pay 20 l. at the Feast of our Lady, without limiting in certain what Lady-day, viz. the Conception, Nativity, or Annunciation. Per tot. Cur. The deed shall be construed to intend such Lady-day which should next happen and follow the date of the bond. 3. Le. 7. 6 Eliz. B. R. Anon.

2. A statute merchant was acknowledged for the payment of 500 l. but *no day of payment was limited*, as mentioned in the statute of Acton Burnel; and the lands being extended, an audita querela was brought, and insisted that the statute was void for that omission; and of that opinion was Hutton J. but the rest of the Court held the statute to be good. And they

Bridge. 16. Melkin v. Hickford. S. C. — Winch. 86. Hickford v. Machin. S. C. And agreed

Hobart Ch. J. makes a quere, if a statute merchant be to pay at several days, whether it be payable till all the days of payment be past, as of a bond.—Hutt. 42. Davis's Case. S. C. but says, a superfoedus was awarded upon the extent, the statute being void for the omission of the day of payment.

### (I.) Payment, limited in the Disjunctive.

Hut. 74. Anon. S. P. —So in case [ 278 ] of lease for life. Per Fleming Ch. J. Cro. J. 228. In Case of Barwick v. Foster.

1. **BOND** for payment of 40 l. annually during the life of B. at the Feast of St. Michael and the Annunciation, or within thirty day after every of the said feasts. B. dies within the thirty days. Held that this is a discharge of the payment due at the feast before his death, Cro. E. 380. Hill. 37 Eliz. in Scacc. Price v. Williams.

### (M) Application. How. Who shall apply the Payment.

If one pays money in satisfaction of a bond, and the party to whom it is paid, saith that he will receive it for another cause, yet if he receives it, it shall be judged to be paid in satisfaction of the bond; for he must receive it upon such terms as the other will pay it. Sic dictum fuit. Sty. 239. Mich. 1650. in Case of Bois v. Cranfield.

1. **THE** defendant being indebted to the plaintiff upon bond, and also upon book, for wares had of him, tender'd the money due on the bond at the day, which the plaintiff accepted, and said it should be for the book debt; but the defendant said, he paid it upon his bond and not otherwise. The plaintiff cross'd his book as discharg'd, and brought debt on the bond, but adjudged against him; for the payment is to be in the manner the defendant would make it, and not as plaintiff would accept it. Cro. Eliz. 68. pl. 19. Mich. 29 & 30 Eliz. Anon.

Mc. 677. Penny v. Core. S. C. says, the Court inclin'd it was a good plea; but does not mention the objection to the form of it.—A.

2. The manner of tender and of payment shall always be directed by him who makes the tender or payment, and not by him who accepts them. And therefore where a less sum was paid in satisfaction of a greater before the day, tho' it was allowed to be a good discharge, yet because the defendant did not plead that he paid it in satisfaction, but that he paid it generally, and that plaintiff received it in satisfaction, the plaintiff had judgment, 5 Rep. 117. Trin. 44 Eliz. Rot. 501. C. B. Pinnel's Case.

bows £. 201. by award and 201. by bond. He pays 201. It shall be on which of both he pleases;

pleases; for he and not the receiver is the *first agent*. Farr. 123. Hill. 1 Anne B. R. Stracy v. Sanders.

3. Money paid *before actual entry of judgment on bond* is to be taken as paid on the bond, tho' the judgment be entered after, as of a term before the payment. Chan. Cafes 24. Trin. 15 Car. 2. Crisp v. Blake. 2 Chan. Rep. 88. S. C. 25 Car. 2.

4. Where interest is due on a *bond*, and the debtor pays any *sum less than the interest*, the payment is to be accounted interest only. Chan. Cafes 106. Pasch. 20 Car. 2. Arg.—Ibid. 24 Arg. in Cafe of Crisp v. Blake. So where it was more, it was to be charg'd to the interest first. 3 Mod.

242. Pasch. 10 Geo. Bostock v. Bostock. — *Judgment was had for principal and interest due on a bond*. Decreed per Bridgman K. on appeal, and confirm'd per Finch K. that what sum the obligee had receiv'd prior to the entry of the judgment should go in discharge of the interest, and what he received after the judgment enter'd, should go first to discharge the interest and then the principal. Fin. R. 89. Hill. 25 Car. 2. Crisp v. Bluck.

5. A. is bound as *surety* for B. to C.—B. owes C. a *further debt* of 100 l. on *simple contract*.—B. and C. come to a stated account for all monies owing to C. as well for what was due on the bond in which A. is bound, as for what is due to C. on simple contract; and there being due to C. 85 l. B. makes a *bill of sale towards satisfaction of the whole debt*; and decreed, that the money arising by the bill of sale shall be applied towards discharge of both debts in proportion. Vern. 34. Hill. 1681. Perris v. Roberts. If there had been 2 debts and a sum of money generally paid, the creditor may elect and choose after to what debt to apply it, when on payment the debtor

made no distinction how he paid it, but the payment (in the principal case) being pursuant to a preceding account of both debts, the payment shall be intended according to the account, viz. on \* both debts, and so shall be proportion'd ratably on both debts; per Ld. Chancellor, and so confirm'd an order of the Master. 2 Chan. Cafes 84. Hill. 33 & 34 Car. 2. Perry v. Roberts.—\* S. P. but obscurely express'd. Show. 216. Pasch. 3 W. & M. Styart v. Rowland.

6. A creditor by judgment and also by bond receives 200 l. of the [ 279 ] purchaser of the estate of the debtor, but gives no notice to the purchaser, that it was to be apply'd towards payment of the bond debt. Per Cur. it shall therefore be apply'd towards satisfaction of the judgment, the 200 l. being part of the purchase money. Vern. 468. Trin. 1687. Brett v. Marsh.

7. A. whilst a trader owes 100 l. to B. and leaving off his trade, borrows of B. 100 l. more—A. pays B. 100 l. not mentioning which. Per Holt Ch. J. it shall be apply'd to the former, so that the creditors shall never charge him with a commission of bankruptcy for that 100 l. which remains. Cumb. 463. Mich. 9 W. 3. Anon.

8. A. was bound to pay B. 500 l. Afterwards C. became surety with A. for 100 l. part of the 500 l. and then A. having a judgment for 500 l. against J. S. assigned it to B. towards satisfying B.'s debt. B. received several sums on the judgment, and the sheriff, by B.'s consent, let A. have 80 l. of the money levied on the judgment assigned to B. This will not any way help C. and go in discharge of any part of the 100 l. he is surety for. But if B. had actually received any money, and had afterwards lent it

See *Maxima*.

—5 Mod.

86.—S. P.

3 Mod. 236.

Anon.—A.

*indebted by**mortgage**and also for**goods to B.**pays money**generally.**It shall be**taken to**have been**paid towards**discharge of the money due on the mortgage, which carry'd interest.*

Vern. 24. Mich.

1681. Heyward v. Lomax.—So if indebted by *bond and for goods.*

2 Brownl. 107.—If one owes

20l. by bond for the payment of 20l. at such a day, and 20l. by *contract* to the same person,*payable at the same day;* and at the day he pays 20l. without telling for which it is, it shall be

a payment in equity upon the bond, because that is most penal upon him. 12 Mod. 559. Mich.

13 W. 3. Anon.

it or any part of it to A. then C. would have been eased by it. Per *Ld. Wright. Ch. Prec. 178. Mich. 17co. Halford v. Byron.*

9. A. indebted to B. by *specialty*, viz. articles under hand and seal, and also on *simple contract* on a running account, pays several sums, and entered them on his own book, as paid on account of what was due on the articles. Per *Cowper C. Quicquid solvitur, solvitur secundum modum solventis*, is to be understood when the person paying declares at the time of payment, on what account he pays it; but if the payment is general, the application is in the receiver, and the entry in A.'s books is not sufficient to make the application. 2 Vern. 606. Hill. 1707. *Manning v. Western.*

### (N) Plea. *What is a good Plea of Payment.*

1. Payment is no plea, unless where the defendant cannot wage his law. *Br. Dette, pl. 96. cites 22 H. 6. 36.*

*Br. Condition, pl. 12. cites S. C.*

2. Payment to a stranger by command of the plaintiff is no plea in debt of 10 l. to pay 5 l. but *contra* of payment to the plaintiff by the hands of a stranger. But in debt of the penalty or of the principal sum specified in the writ of debt, payment is no plea. *Br. Dette, pl. 15. cites 27 H. 6. 6.*

3. Debt of 10 l. the defendant said, that the plaintiff has received 5 l. of it pending the writ and no plea, but shall answer to the debt; but acquittance of part suffices to discharge all the action. *Br. Debt, pl. 137. cites 3 H. 7. 3.*

4. And in debt for rent upon a lease for years, payment of parcel in another county is a good plea, and shall abate all the writ. *Ibid.*

*Cro. El. 455. S. C. —Mo,*

692. S. C.

*Chamber-**lane v. Ni-**chols. —**Jenk. 257.**S. C. —Mo.*

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11, 12. *Sta-**pleton &**Bowet v.**Trewlock.*8. P.—*Cro. El. 157. Etam v. Tottam S. P. —Cro. E. 834. Colbrook v. Foster. S. P. —Dy**25. b. pl. 160. Anon. S. P. per Montague. —Dy. 51. Mich. 37 H. 8. B. R. Waberley v. Cock-**erel. S. P. Arg. —S. P. and a fortiori, it is not a good plea in a scire facias upon a judgment, which**is a debt upon record. Resolved per Cur. Trin. 35 Car. 2. C. B. Rot. 117. Kettelby v. Hales. —**To a bond with condition indoried payment is a good plea before breach, but not afterwards, no**more than to an action of debt upon a single bill; for the benefit of the condition is lost when the**breach is made. Per Holt Ch. J. Trin. 13 W. 3. 2 Salk. 508. Marle v. Make.*

5. In debt upon a single bill, the defendant pleads payment without acquittance; upon which issue was taken and found for the plaintiff. It was held that payment without acquittance is no plea, and so issue was join'd upon a thing not material; for if the defendant had paid the sum without an acquittance, yet the single bill had remain'd in force. But there having been an issue join'd upon an affirmative and negative, and found for the plaintiff, it was held to be aided by the statutes of jeofails; and plaintiff had judgment, which was affirm'd on a writ of error. 5 Rep. 43. Mich. 37 & 38 Eliz. B. R. Nichols's Case.

6. In debt upon obligation the condition was, that the defendant should pay from time to time the moiety of all such money as he shall receive, and give account; and per Cur. payment pleaded is good without shewing the particular sums; but they agreed, that if the condition had been to pay the moiety of &c. without saying from time to time, it ought to be pleaded specially. *Quære* the diversity. Sid. 334. Pasch. 19 Car. 2. *Church v. Brownwick*.

7. 4 & 5 Ann. cap. 16. s. 12. enacts, That in debt on single bill, debt, or *scire facias* on judgment, defendant may plead payment in bar. In debt on bond, if the defendant before action brought hath paid the principal and interest due by the defeasance or condition, tho' such payment was not made strictly according to the condition or defeasance, yet it may be pleaded in bar, and shall be as effectual as if the money had been paid at the day and place, according to the condition, and had been so pleaded.

### (O) Proof of Payment. What is.

1. THE Court inclined, that a receipt in the mortgage deed, and condition of redemption on re-payment of the money, and defendant's oath that he had paid it, was evidence enough of payment after ten years against any person. Chan. Cases 119. Hill. 20 & 21 Car. 2. *Goddard v. Complin*

2. Bill against an executrix for performance of articles, by which her husband was bound to pay 6000 l. to the plaintiff, who acknowledged the receipt of the whole, viz. 4000 l. in money, and the rest by a conveyance of lands; decreed, that the acknowledgment is an evidence of the performance, since the plaintiff made no further demand for several years; and it is unreasonable to put an executor to prove a precise payment after so long a time, and the acknowledgment under hand and seal ought to be conclusive, and dismissed the bill. Fin. R. 246. Hill. 28 Car. 2. *The Duke of Newcastle v. Cleyton*.

### (P) Payment. Devise or Settlement for Payment of Debts. How. *Pari Passu*.

1. WHERE an equity of redemption or trust estate is devised for payment of debts, all debts shall be paid equally. \* But if such devisee be also made executor, then do the lands so devised become legal assets, and then debts must be paid according to their precedency or superiority at common law, and this is said to have been resolved in Case of *HIXINE v. MORLY*, and decreed accordingly here. Vern. 63. Mich. 1682. *Girling v. Lee*.

\* S. P.  
Chan. Cases  
275. Pasch.  
28 Car. 2.  
*Whitton v.*  
*Lloyd*.—  
S. P. 2  
Vern. 248.  
Mich. 1691.  
*Greaves v.*  
*Powell*.—

2 Vern. 405. Mich. 1700. S. P. Anon.—Chan. Prec. 127. Mich. 1700. *Cutterback v. Smith*.—

Chan. Prec. 176. Mich. 1700. *Bickham v. Freeman*.—Lord Cootper thought the accident of being made executor (which Mr. Vernon insisted strongly upon) ought to make no difference in equity, but that all creditors should be considered equally, and would see precedents, though Mr. Vernon said it had been a settled distinction, and that there were several precedents in point. Ch. Prec. 4:8. Trin. 1715. *Challis v. Calborn*.

A distinction was taken Arg. that where a devise of lands to be sold for payment of debts is made to *executors and their heirs*, they are legal assets, and debts must be paid in a course of administration; otherwise if devised to *trustees who were not executors*, or to *executors and a third person a stranger*, in either of which cases they would only be equitable assets; but at the first hearing the Master of the Rolls seemed not to agree, in regard generally all devises for payment of debts are to executors; but in the principal case, the premises devised being mortgaged in fee by the testator, and he having nothing but an *equity of redemption*, it was resolved by Lord C. King, that it could be only equitable assets, and consequently must go amongst all the creditors equally; for as much as a debt by judgment, and a debt by simple contract are in conscience equal. 2 Wms's Rep. 414 to 416. Trin. 1727. *Deg v. Deg*.

*Debts on judgments that in their own nature charge lands, shall have the priority where lands are settled for payment of*

2. A. having mortgaged his estate several times over, and for near the full value to each mortgagee, and being likewise indebted on judgment bonds and simple contracts, settles his estate for payment of his debts; the *real securities* shall be first paid, and then the bonds and simple contract debts in an *average*. Vern. 101. Mich. 1682. *Child v. Stephens*.—And a judgment not decreed to take place of the after-mortgagees. Ibid. 103. S. C.

but where they are \* *given to pay debts and legacies*, they shall be paid in equal proportion. Chan. Cases 32. Mich. 15 Car. 2. *Woltoncroft v. Long*.—See Chan. Cases 248. Mich. 26 & 27 Car. 2. S. P. but no judgment. *Hixon v. Witham*.—3 Chan. Rep. 12. S. C. —\* If lands are *devised or conveyed* to pay debts, the payment must be in proportion equally of debts by bond or otherwise. 2 Chan. Cases 201. Mich. 26 Car. 2. *Parker v. Dee*.

*And Lord Chancellor declared, that when lands are settled for payment of debts generally, all the creditors are equally intitled, and in such case debts with*

or without speciality are equally regarded; for though there is a *difference in case of executors* who are to pay specialties before promises, that is an *artificial preference* by law, but naturally a debt by contract without speciality is as just as the other; and the conveyance to the trustees (being themselves creditors and sureties for a guard) does not give them any preference. Ibid.—*And though some circumstances* in this case might give hope or confidence to the trustees, that they might prefer themselves, viz. that B. was his servant, and C. lent his money at the time of the conveyance, and some speeches tending to declare such trust, yet that alters not the case; besides, that such trust was since the statute of frauds and perjuries. Ibid.

3. A. being indebted to B. C. D. E. and F. conveyed lands to the use of himself for life, and after the use of his will, and by his will *devised to B. and C. for the payment of his debts* and died. B. and C. sold the lands and paid themselves, and such other creditors as were sureties to for A. by which the assets were exhausted and nothing left to pay D. E. and F. who brought their bill to have a proportionable satisfaction, which was decreed accordingly. 2 Ch. Cases 54. Trin. 33 Car. 2. *Gell v. Adderley & al.* Trustees of Agard v. Smith the administrator of Agard.

4. A term was in trust to raise any sum not exceeding 1500 l. for payment of debts which he should owe at his death. He borrows 1000 l. of J. S. and by deed appoints his trustees to pay that 1000 l. out of the trust estate, and dies indebted to several other persons in more than the 1500 l. would pay, decreed the 1000 l. to be paid in the first place. Ch. Prec. 44. Pasch. 1692. *Seymour v. Fotherby*.

5. A.

5. A. devised his real and personal estate for payment of debts and legacies. B. a creditor gets judgment against the executor, and then he and other creditors that had not judgment joined in a bill, and had a decree for sale of the estate and payment of the debts in proportion. B. proved his debt, received several dividends, and then petitioned for a re-hearing; for that he being a judgment creditor should have preference to other creditors as to the personal estate. But the Court would not alter the decree for the reasons above, and thought if any preferences were to be, B. should bring what he had received into *hotch-pot*, and should then take either *all law, or all equity*; per *Ld. Wright. Ch. Prec. 190. Pasch. 1702. Shepherd v. Kent.*

S. P. and Parker C. disallowed the difference usually taken between assets in law and assets in equity, as without any reason or [ 282 ] foundation, and contrary to the known rules

of law; but in case of land devised to be sold for payment of debts, this Court always decrees the profits arising from the sale equally among all the creditors; but then this may be considered as a gift of testator among all the creditors, and this Court will make no distinction where testator did not, Chancery being as it were his trustee. 10 Mod. 427, 428. Mich. 5 Geo. 1. *Willson v. Fielding.*

6. A judgment obtained after a conveyance made for payment of debts shall not affect the estate as a judgment, and shall only be paid in proportion; per *Lord Harcourt. Chan. Prec. 310. Hill. 1710. Stephenson v. Hayward.*

7. A term is raised, and the trust declared to pay all debts in proportion, without preferring one debt to another; the bond creditors were satisfied part of their debts by the executors out of the personal estate; notwithstanding which, *Lord Harcourt* held, that they may still come in for the remainder in proportion with the simple contract creditors; for the law gives the fund of the personal estate to the bond creditors, and the party gives the fund of the trust term; and the clause that no debts shall have preference, must be intended only with regard to their satisfaction out of the trust term. *Wms's Rep. 228. Trin. 1713. Car v. the Countess of Burlington.*

But see 2 *Wms's Rep. 416. Trin. 1727. Doe v. Doe*, where A. devised all his real and personal estate to his executors and their heirs, in trust to be sold for payment of all

his debts; it was decreed by the Master of the Rolls, and affirmed by *Lord C. King*, that though the specialty creditors might have the preference out of the personal estate, yet if they do so, and would afterwards come in upon the lands so devised, they should first bring into *hotch-pot* what they had received out of the personal estate; for the testator had connected his real and personal estate with a view that all should go equally, and he might give his equitable assets upon what terms he pleased.

8. A. devised his lands for payment of all debts, but did not devise them to be sold for payment of debt, but permitted them to descend charged with the debt, and therefore it was insisted, that they were legal assets by descent as to the bond creditors, and charged only in equity by the will as to simple contracts, and *Ld. C. Parker* held, that the bond creditors shall be preferred to those by simple contract. *Wms's Rep. 429. Pasch. 1718. Freemoult v. Dedire.*

But if the heir before any action brought had sold the lands, and then the bond creditors had brought their ac-

tions, they should have been paid only their share out of the assets; per *Ld. C. Parker*; and he said it is observable, that by the express words of the statute of 3 & 4 W. & M. 14. where there is any devise or appointment by a will of lands for payment of debts or portions to children, other than the heir at law, according to an agreement before marriage, such will shall be of force. *Wms's Rep. 430, 431. Pasch. 1718. Freemoult v. Dedire.*

9. There

9. There is a *difference* in equity, when a debt by simple *contract* is turned into a debt of a superior nature by a judgment confessed by testator, and when by the executor; in such case the former shall have a preference according to law, with respect to the equitable assets, but not the latter; per Parker C. 10 Mod. 426. Mich. 5 Geo. 1. Wilson v. Fielding.

(Q) *What Debts* are to be paid by *Virtue of such Devise or Settlement.*

1. A. Settles lands for payment of his debts; the lands so settled shall be liable to debts of A. as he was executor of B. his father. Chan. Rep. 249. 16 Car. 2. Fleming v. Taylor.

[ 283 ] 2. A. was indebted 100 l. and made B. his executor and dy'd; B. made C. his executor, and devised to C. lands to pay his debts. J. S. to whom A. was indebted, prays satisfaction out of the personal estate of A. and B. and out of the lands. This provision of the devise of lands to pay debts does not extend to debts of A. nor to make satisfaction out of the lands if B. had waived the personal estate of A. to the value of the debt. For this devastavit by B. tho' it is a charge upon him, yet is not within the will of lands charged for payment of debts; for it is not properly a debt by contract, but *ex maleficio*, which is not within the meaning of the will; per Finch C. 2 Ch. Cases 215. Pasch. 28 Car. 2. Price v. Morgan.

3. Lands are settled for payment of debts, amounting to a sum in gross, viz. 1000 l. they are liable to pay the interest as well as the principal, and shall make good what shall be paid out of the personal estate. Fin. R. 286. Hill. 29 Car. 2. Shipton v. Tyrrell.

4. A. makes a deed of trust for payment of his debts, to take effect after his death; the words in the deed were (*monies owing by him*); and a *schedule* was annexed to the deed, wherein mention was made of 1000 l. owing to A. and 500 l. owing to B. and then there is this item, viz. the sum of 3000 l. owing to other persons. Decreed, that the lands should stand charged only with such debts as were owing at the time of making the deed; and Finch C. said it was so in all cases where a deed is made for payment of debts owing, unless it be expressed to be for payment of such other debts as he should after contract, or to that effect. Vern. 28. Hill. 1681. Purefoy v. Purefoy.

5. A. has a decree against B. for 2700 l. debt. B. appeals to the House of Lords, where the decree is affirm'd; B. petitions and has an order for re-hearing, and being extremely affected with his ill success falls ill, makes his will, and devises his lands for payment of his debts. Per North K. It cannot be supposed that B. who deny'd A.'s debt on oath, and dy'd his martyr in his cause, should ever intend any benefit of this trust to A. So in case of a verdict, and he had brought attaind and made such settlement,

tlement, the debt recovered by the verdict could never be intended to be satisfied. But at length decreed, that after all debts on simple contract were paid, A. should be paid his debt if he could find assets. Vern. 142. Hill. 1682. Norden v. Norden.

6. A. while a Student at Cambridge, and being but just come of age, was drawn by circumvention into a covenant for payment of a *portion which he was not otherwise liable to*, and which he afterwards refused the payment of, and refus'd to levy a fine of his lands, though decreed so to do, to subject to the payment of it. Afterwards he *devise'd his lands for payment of his just debts*. The question was, whether this contested debt should be paid? and that it should not was cited the Case above, of NORDEN v. NORDEN. But Ld. C. Jeffries said, The law has said it is a just debt, and therefore it must now be taken as such; and had not the lands been devise'd, but have descended on his heir, they would be assets, and liable to the covenant; and decreed the debt with interest. Vern. 431. Hill. 1686. Lord Hollis v. Lady Carr.

7. A. by will gives B. 400 l. in satisfaction of all monies owing to him, and subjects his real estate to the payment of his debts. A. owed B. 800 l. but it was barrable by the statute of limitations. The Lords Commissioners decreed the payment of the whole 800 l. notwithstanding the words of the will and the *statute of limitations*. 2 Vern. 141. Trin. 1690. Goston v. Mill.

really owed B. 400 l. and D. 500 l. &c. and afterwards by that will subjects his lands to the payment of his debts, they would be liable to pay all that was due to B. and D. &c. notwithstanding the testator's mistaken recital; per Ld. Rawlinson. Ch. Prec. 10. Trin. 1690. in Case of Goston v. Mills.—\* S. P. 1 Salk. 154. 1707. + 2 Wms's Rep. 374. Arg. cites this as the Case of Stagger v. Welby.—And upon producing this Case Ld. C. King over-ruled a plea of the statute of limitations. Trin. 1726.—But, on appeal to the House of Lords, this decree was reversed, and ordered the plea to stand for an answer. Ibid. Blakeway v. the Earl of Stratford.

8. The plaintiff had brought his action against M. for *lying with his wife*; and 13 January 1689, M. made a conveyance of his land to trustees, in *trust to pay his debts mentioned in a schedule annexed to the deed, and such other debts as he should appoint, within ten days in Hillary Term following*; the plaintiff recovered 5000 l. damages against M. and brought his bill to be relieved against the deed as fraudulent against him, and made to defeat him of his debt. Per Cur. This deed is not fraudulent either in law or equity for such debts as are named in the deed; for the plaintiff was no creditor at the making of the deed; and tho' it was made with an intent to prefer his real creditors before this debt, when it should come afterwards to be a debt; yet it was a debt founded in *maleficio*, and therefore it was conscientious in him to prefer the other debts before it; but the plaintiff may come in upon the surplus after the debts mentioned in the schedule, or appointed within ten days, pursuant to it, are satisfied. Mich 1699. Abr. Equ. Cases 149. Lewkner v. Freeman.

9. The plaintiff's relation (to whom he was heir) allowed his

Chan. Prec. 9. S. C.—So where A. recites in his will, *whereas he is indebted to B. 300 l. to D. 400 l. &c.* when he

[ 284 ]  
Freem.  
Rep. 236.  
pl. 308.  
Hill. 1699.  
S. C.

his wife *pin-money*, which being in arrear, he gave her a note to this purpose, I am indebted to my wife 100 l. which became due to her such a day; after, by his will, he makes provision out of his lands for payment of *all his debts, and all monies which be owed to any person in trust for his wife*; and the question was, whether the 100 l. was to be paid within this trust? And my Lord Keeper decreed not; because in point of law it was no debt, for that a man cannot be indebted to his wife, and it was not money due to any in trust for her. Hill. 1701. But quære, for the testator looked on this as a debt, and seems to intend to provide for it by his will. Abr. Equ. Cases 66. Cornwall v. the Earl of Mountague.

Ch. Prec.  
502. Mich.  
1718. Anon.  
seems to be  
S. C.

10. A. gave M. his wife the foul distemper twice, upon which she left him, and J. S. lent her 30 l. to pay doctors &c. and for necessities. Afterwards A. devised lands for payment of debts and died. On a bill by J. S. it was held by the Master of the Rolls, that admitting the wife cannot at law borrow money so as to bind the husband, yet it being applied to her use for cure and necessities, the plaintiff, who lent it, must in equity stand in the place of those who found and provided such necessities; and therefore as such persons would be creditors of the husband, so the plaintiff must stand in their place and be a creditor also, and directed the trustees to pay his money and costs. Wms's Rep. 482. Mich. 1718. Harris v. Lee.

11. A. an infant married without his father's consent, and being discarded by him, borrowed money to support himself and wife to the amount of 130 l. and having a considerable estate in reversion after his father's death, and soon after coming of age, he devised his real estate to trustees for payment of his debts with interest. It was held by the Master of the Rolls, that there not being in this case any circumstance of fraud, and the money not being advanced to supply the infant's extravagancies, and the money being but 130 l. and infant's estate considerable, and he being on his father's displeasure left destitute, and obliged to borrow for his necessary support, and considering also particularly, that he did not barely desire that his debts should be paid but with interest also (which is unusual), it was decreed, that this money actually lent as aforesaid, though during the testator's infancy, was within the trust. Wms's Rep. 558. Trin. 1719. Marlow v. Pitfield.

12. If a man devises his lands for payment of his debt, this devise makes the land as a security or mortgage for all the testator's debts, as well those by simple contract as otherwise, and the simple contract debts shall carry interest, as the land, which is the fund, yields annual profits; per Lord C. Macclesfield, who said it was the daily practice. 2 Wms's Rep. 27. Trin. 1722. Maxwell v. Wettenhall.

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13. If a trust be created for payment of debts without specifying what debts, but as to one debt the party interested in the estate charged forbids the trustees to pay it, as not thinking it a real or just debt;

debt; if the trustees should afterwards spontaneously pay this debt, they ought not to be allowed it. Arg. 2 Wms's Rep. 454. Pasch. 1728. in Case of Balsh v. Hyham.

(R) Devise or Settlement for Payment of *Debts or Legacies*. Where they shall be paid *Pari Passu*.

1. **WHERE** lands are given to pay debts and legacies, they shall be paid in proportion; but in case of debts on judgments that in their own nature charge the land, it is otherwise. Chan. Cases 32. Mich. 15 Car. 2. Woolstencroft v. Long. So where an equity of redemption was devised for payment of debts and legacies, they shall be paid *pari passu*, unless the estate stood charged with the debts before. N. Ch. R. 102. Pasch. 1692. Powell's Case.—But if the lands are then mortgaged, prevents the judgment affecting the land. Arg. Vern. 64, 65. Mich. 1682. in Case of Girling v. Lee.—Yet after-judgments shall be paid before bonds and simple contracts. Vern. 101. Mich. 1682. Child v. Stephens.

2. *Legacy to an executor* is to be paid in proportion with others, so far as the estate will extend with damages, and it is not like the case at common law, where the executors pay their own debts and legacies first, or him that first\* sues, his whole legacy before others. 3 Ch. R. 54. 22 Car. 2. Butler v. Coote. \* And gets judgment. Nelf. Ch. R. 1:2. S. C.

3. *Trust* was for raising portions and maintenance of children; and for payment of debts; decreed per Bridgman K. to be paid *pari passu*; but on a re-hearing it was decreed by Finch K. that the children's maintenance should be first paid, the debts in the next place, and the portions last. Fin. R. 88. Hill. 25 Car. 2. Sir Robert Bells v. Sir John Bells. cited Jonns's and by an to *pari passu* by in 8.

Lord Nottingham, who said, he would not make a man sin in his grave, and that if case of a trust for payment of debts and legacies, the debts should be preferred. Mich. 1691.

4. A. devises his lands to his executors towards payment of his debts and legacies. Per Finch C. Debts must be paid before legacies, and he took a difference between such appointment made by conveyance and by will. Chan. Cases 275. Pasch. 28 Car. 2. Whitton v. Lloyd.

5. Where land is devised to be sold for payment of debts and legacies, Jeffries C. was of opinion, that the debts and legacies should be paid in equal proportion, without any preference to the debts; and so it was resolved in the Case of SIR JOHN BOWLES by the † Ld. Nottingham, that debts and legacies should be paid *pari passu*; but the Lord North reversed that decree, and gave preference to the debts; and so likewise Ld. North decreed the debts to be first paid in the Case of \* HIRON v. WHITHAM; but Ld. Jeffries declared he was not satisfied with that opinion, and would consider of it. Vern. 412. Mich. 1687. Gosling v. Dorney. The money raised by sale shall be legal assets, and the debts and legacies paid in proportion; per Lords Commissioners. 2 Vern. 133.

196. Hill. 27 Car. 2. S. C. and so decreed per Finch K. cited Vern. 406. Mich. 1700. Anon.—† But see pl. 3. and the note there, \* s. n. R.

2 Vern. 247.  
Mich. 1691.  
Callingham  
v. Mellish.

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6. A. makes his nephew his sole *executor*, and *devises to him and his heirs all his lands in trust to sell, and pay* all his debts and his children's portions with the monies to be raised by the sale, and personal estate; and gave 100 l. to each of his children, of which there were nine. Per Lds. Commissioners, the devise being *to him and his heirs*, the lands must go in a course of descent, and he must take as a trustee and not as an executor, and therefore decreed the debts and portions to be paid *in proportion*. 2 Vern. 133. Hill. 1690. Anon.

So if it was  
only a *trust*.  
See sup.  
pl. 3. 5.  
Sir John  
Bowles's  
Case. —  
Where the  
devisees are

7. Devise was to *trustees* for payment of debts and legacies, and the *trustees* are made *executors*. The estate is deficient. Per Cur. No doubt the trustees being made executors, when the estate is sold, the money becomes legal assets; and debts therefore must be preferred. 2 Vern. 248. Mich. 1691. Greaves v. Powell.

made *executors*, the money raised by sale of the lands becomes *legal assets*, and the debts must be first paid; but it is otherwise where the *devisees* are not *executors*. Per Ld. Wright. 2 Vern. 405. Mich. 1700. Anon.

So where the charge was with the payment of all such debts as I shall owe at my death, and also with the several legacies therein after mentioned; and after giving several legacies, the testator devised several copyhold lands, which he had surrendered to the use of his will, to his eldest son and his heirs, subject to, and charged with all his just debts, and the several legacies therein before bequeathed, and he made his said son executor. Ld. C. King said that the words (*and also*) were not material; but what was most material was the devise to the executor, which must be taken to be to enable him to pay the debts and legacies, and his assets; and whether *legal or equitable assets*, are the same thing; for equitable assets in the hands of the executor must be applied as legal assets are, first to pay debts, and then legacies; and decreed accordingly. 2 Wms's Rep. 550. Trin. 1729. Walker v. Meager.

But where there is a bare trust for payment of debts and legacies, Ld. C. King said it might be otherwise, and the legatees might then have a right to be paid equally. 2 Wms's Rep. 552. Trin. 1729. In Case of Walker v. Meager.

N. B. The Editor adds a *querre*, whether it is not now the practice, in case of a trust for a payment of debts and legacies, to prefer the former? and refers to 2 Vern. 248. Greaves v. Powell.

8. A. before the statute against fraudulent devises, *devised a freehold estate to his second son and his heirs*, subject to the payment of debts and a legacy of 500 l. And the question being, whether the debts should be preferred to the legacy? Ld. Harcourt said he would expound the testator's meaning to be what it ought to be, viz. to pay his debts before he was charitable; and decreed the debts to be first paid. 2 Wms's Rep. 551. cited Arg. as the Case of Petre v. Bruen.

S. P. Chan.  
Cases 32.  
Mich. 15.  
Car. 2.  
Woolsten-  
croft v.  
Long. —  
which see at  
(P) pl. 2.  
marg.

9. A mortgagee, who had nothing left but an *equity of redemption* of the mortgaged lands, devised the said equity of redemption for the payment of his debts and some legacies which he had bequeathed to several persons by his said will. It was decreed, that if the estate did not stand charged with the debts before, but only by the will, in such case, both *creditors and legatees* shall come in *pari passu*. N. Ch. R. 202. Pasch. 1692. Powell's Case.

S. l. Cases  
in Chan. in  
Ld. King's  
time. 26.  
S. C.

10. One who had formerly *compounded debts with his creditors*, and thereupon was *released by them*, proving afterwards fortunate in the world, made his will, and thereby gave several legacies; and among others, *to such of his creditors as had compounded his debts with him &c.* The Court thought that by the release the debts

debts became extinct, and so those compounding-creditors legatees were out of the case as creditors, and must now claim as voluntary legatees, and could have no other title than to the legacies in such manner given by the will, and not to be preferred in payment, the personal estate not being sufficient to pay all. 2 Wms's Rep. 291, 293, 296. Trin. 1725. Coppin v. Coppin.

(S) *What is a good Devise, or good Settlement for [ 287 ]*  
Payment of Debts.

1. **D**EED in trust to pay debts, tho' the *creditors* are *not parties*, and *no certainty of debts* therein appearing, yet is good against an *after purchaser*, who had notice of this trust. 2 Chan. Rep. 30. 21 Car. 2. Langton v. Tracy. It is not good against a purchaser, per Ld. K. Finch. Chan. Cases
249. Hill. 26 and 27 Car. 2. Leech v. Leech.—[But in this case nothing is mentioned of notice.]

2. A. *seised of land in fee-simple, bequeathed it to his executor to pay debts.* The executor has no estate of freehold; for if he should, it must be either for life, which might soon determine before debts paid, or in fee-simple, which would carry away the land from the heir for ever; when perhaps a few years profit might suffice to satisfy the debts: and also by death of the executor, the land should descend to his heir, and not to go to his executor, who would be executor of A. the first testator. Went. Off. Execu. 253.

(T) *What shall be liable to the Payment, or shall be said charged.*

1. **R**everſion after an *estate tail* (the estate tail being determined for want of issue) is subject to trustees for payment of debts. 2 Chan. Rep. 208. 32 Car. 2. Bruce v. Gape.
2. *I will all my debts shall be paid before any of my legacies or gifts herein after mentioned;* and then devised several pecuniary legacies; and after, in the same will, devised lands to J. S. on condition to pay a certain rent to J. N. and other lands to J. S. on condition to pay 5 l. per ann. to J. D. *Quære* if these lands are by the will subjected to the payment of the testator's debts, or only to the payment of the particular rents thereunto devised? Per Cur. The lands are not *subjected to the payment of testator's debts.* The general clause in the beginning of the will shall be intended only of the personal estate, and the pecuniary legacies thereout devised. Vern. 457. Pasch. 1687. Eyles v. Cary.
3. A personal estate not *specifically devised* is to be applied to payment of debts, and the *real estate* shall not be subjected thereto,

thereto, but only *supplementarily*. 2 Chan. Rep. 382. 1 Jac. 2. Middleton v. Middleton.

4. A. seised in fee, devised his lands to B. and the heirs of his body; and in the same will *desired* B. to pay all his debts. Ld. C. Jeffries decreed the lands should stand charged with payment of the debts, tho' it was *but a kind of devise for that purpose* after an estate tail; and affirmed in *domo proc.* N. Ch. R. 178. Mich. 1691. cited as *Pelham's Case* in the *Case of Webb v. Sutton*.—But it seems that a desire to pay a *money legacy* is no charge on the land. *Ibid.*

5. A. seised of *freehold and copyhold* land, surrenders to the use of his will; and then devises to B. *all his goods, chattles and estates whatsoever, upon condition* that she pay his debts and legacies, and makes B. executrix and dies, leaving C. the defendant his son an infant. B. dies before probate of the will. On a bill by the creditors for the sale of the estate, the personal estate being deficient, the Court thought the words, with other circumstances of the case, would pass the lands, and decreed a sale, and the *heir to join* when he comes of age; but he being an *infant*, day was given him to *shew cause*, after he comes of age. Ch. Prec. 37. Mich. 1691. *Lumley v. May*.

[ 288 ] 6. If a man devise an annuity to a child to be issuing out of certain lands, and by the same will he devises the same lands for the payment of his debts and legacies; the devise of the *annuity is a subsisting charge* on the lands, and shall be good. This was so held N. Ch. R. 202. Pasch. 1692. in *Powell's Case*.

[For more of Payment in general, see Charge, Condition, Tender, Trial, and other proper Titles.]

## Peculiars.

### (A) The several Sorts; and Pleadings.

1. THE Court of Peculiars is that which dealeth in certain parishes, lying in the several diocesses, which parishes are exempt from the jurisdiction of the bishops of those diocesses, and are peculiarly belonging to the Archbishop of Canterbury, within whose province there are 57 such peculiars; for there are certain peculiar jurisdictions belonging to some certain parishes, the inhabitants

bitants whereof are exempt sometimes from the archdeacons, and sometimes from the bishop's jurisdictions. Godolp. Rep. 119. cap. 11. f. 16.

2. If a man *be sued* out of his diocese; yet if it be within his proper peculiar, it is not within the stat. of 23 H. 8. Per Coke. Roll. R. 329. Hill. 13 Jac. B. R. Moore v. Cockein and Sanderfon.

3. It cannot be intended peculiars have any authority, unless it be *shewn*; but the archdeacon is oculus episcopi, and de jure ordinario he is to commit administration. Cro. J. 556. Mich. 17 Jac. B. R. Chiberton v. Trudgeon.

The bishop's official shall be intended to have jurisdiction, but the authority of a peculiar must be set forth.

2 Mod. 65. Hill. 27 & 28 Car. 2. C. B. Dawes v. Harrison.

4. Upon a declaration in prohibition, and the pleading to it upon demurrer, 2 questions were argued; 1st, upon the remissuriam by the dean of Salisbury, who had a peculiar, and he made letters of request to the dean of the arches; upon which it was objected, that this was per saltum, and that he ought to have made his request to the immediate ordinary, and Hob. 16. 186. and Cro. Car. 262 &c. were cited for this purpose, but non allocatur; for tho' this is true, if it was a peculiar of an archdeacon or any other subject to the jurisdiction of the ordinary, that then the objections made, and the cases cited would hold. But to this Holt Ch. J. said, that there are three sorts of peculiars. 1. The first, which is when archdeacon &c. have a peculiar *within the diocese and subject to the jurisdiction of the ordinary*. Second, when one has a peculiar *not subject to the ordinary, but to the archbishop*. And the third is, when one has a peculiar *subject neither to the ordinary nor to the archbishop*, as there are some. And he said, that tho' the dean of Sarum is to some purposes subject to the jurisdiction of the bishop, yet as to this peculiar it is all one as if it was in a stranger; and it is not under the jurisdiction of the bishop of Sarum, more than of the bishop of London; and if he had made request to the bishop of Sarum, and the party had been cited upon it, such citation had been a citation out of his diocese within the statute of 23 H. 8. and it does not appear that he is within the jurisdiction of the bishop of Sarum; and therefore it shall not be intended, per Holt Ch. J. Skin. 589. Mich. 7 W. 3. B. R. Johnson v. Ley. [ 289 ]

5. A citation was in the consistory of . . . . and a prohibition was mov'd upon three several points; and of which one was, that the said church was within such a peculiar, and consequently not within the jurisdiction of the consistory court, not even by letters of request. And by Holt Ch. J. all peculiars are *not inferior to the ordinary* of the diocese in which they are; and such, as are not, cannot transmit any cause to the ordinary, and such *transmitting must always be to the immediate superior*: the dean and chapter of Salisbury have a large peculiar within the limits of the diocese, but as much out of the jurisdiction of the diocese of S. as the diocese of London is. The peculiar

If a peculiar be subordinate to the bishop, then he cannot refer a cause to the archbishop, but to the immediate ordinary, as archdeacon or commissary must do; otherwise is

if the peculiar has his immediate resort to the archbishop; but if the peculiar be free by a general exemption from all ordinary jurisdiction (which was

common in the case of monasteries both by the grants of Kings and Popes) then the cause must be remitted to the King, as appeals must be also in such cases; and so, it is provided by the Statute of 25 H. 8. cap. 31. Per Hobart Ch. J. Hob. 186. Jones v. Jones——If a sentence is given in a peculiar, the appeal is to the archbishop, and not to the bishop of the diocese; which proves it to be of exempt jurisdiction. 11 Mod. 6. Pasch. 2 Annus B. R.

peculiar jurisdiction of an archdeacon is not properly a peculiar, but rather a subordinate jurisdiction. Vid. Hob. 185, 186. and the remission of the cause must be to that jurisdiction, to which the appeal would lie, in case the cause had not been remitted: and a peculiar *prima facie* is to be understood of him that has co-ordinate jurisdiction with the bishop: and therefore what sort of peculiar this is, would be improper to determine upon motion; and if your suggestion were right, it were fit for a prohibition, and the matter to come in debate on a declaration therein. 6 Mod. 308. Mich. 3 Ann. B. R. Treil v. Edwards.

[For more of Peculiars in general, see Executors and Administrators, Prohibition, and other proper Titles.]

## Peers.

### (A) Peerage.

1. IN ancient time, none might be a *baron* who had not 13 knights fees, and he that had so much might come *without writ* to the parliament to give advice. And now when barons have been called to the parliament by the King, or created by patent, they are barons of some place and seigniori which is intended great command and revenue, and their tenants of those ancient baronies are discharged of contribution to the wages of knights in parliament, because their lords serve for them in parliament; and Ld. Chancellor said, if a baron waste his estate, so that he is not able to support the degree, the King may degrade him. Mo. 768. Mich. 3 Jac. in the Case of the Countess of Rutland.

2. Dignity of peerage is not barrable by *fine*. Parl. Cases 11. The King v. Viscount Purbeck.

## (A. 2) His Duty and Power.

1. **T**HE statute of Marlebridge 52 H. 3. cap. 10. excuses *bishops and peers from paying attendance at the tourn unless their presence be specially required for some cause.* Vid. 2 Inst. 120, 121.

2. Upon construction of statute 13 H. 4. cap. 7. with the statute of 17 R. 2. 8. and also with the statute of 2 H. 5. 8. it has been held, that even noblemen are *bound upon pain of fine and imprisonment, upon reasonable warning to attend the justices in execution of the said statute, and not only to arrest rioters, but even to conduct them to prison.* Hawk. Pl. C. 161. cap. 65. f. 20.

3. No duke, earl or baron, *as such*, have any greater authority to keep the peace than mere private persons. 2 Hawk. Pl. C. 32. cap. 8. f. 1.

## (B) Attendance in Parliament.

1. **L**ORDS Mordant and Sturton were *fin'd* in the Star-Chamber, for not attending the first day of the Parliament, having been summon'd under the Great Seal, viz. 10,000 marks Mordant, and 6000 marks Sturton, and remanded to the Tower of London during the will of the King.

N.B. This was at the time of the Powder Plot, to which they were thought to be privy.

N.B. The excuse of *Ld. Sturton* for his not coming was, *that he was indebted 130*l.* and dar'd not come to Parliament.* Mo. 780. 3 June, 4 Jac. *Ld. Sturton and Mordant's Case.*

Noy. 102.  
S. C.—It  
is not trea-  
son nor fe-  
lony, but it  
is trespass to  
depart from  
the Parlia-  
ment with-  
out the  
king's leave.  
Standf. Pl.  
C. 38. (A)  
—Hawk.

Pl. C. 59. cap. 22. f. 20

## (C) Privilege.

1. **M**ag. Chart. 9 H. 3. cap. 14. **E**Naçts, That *Earls and Barons shall be amerced, but by their equals, and after the quantity of their trespass.*

2. **C**apias does not lie against an *\* abbot nor a bishop, tho' he be return'd nihil in the first county, and is returned nihil upon a testatum in a foreign county also; and the same law of a † lord of parliament.* Br. Exigent, pl. 3. cites 27 H. 8. 22.

\* S. P. Ibid.  
pl. 2. cites  
26 H. 8. 7.  
—† S. P.  
Ibid. pl. 2.  
cites 26 H.

3. 7.—*But if rescous be returned upon a lord of parliament, capias lies for the contempt.* Br. Exigent, pl. 3. cites 27 H. 8. 22.—S. P. per Popham. Mo. 767, Mich. 3 Jac. in the Countess of Rutland's Case—S. P. Cro. E. 170. Lord Stafford v. Thynne.—S. P. Fin. Law, 8vo. 355.

Serjeant Hawkins says, it seems that even peers of the realm, whether spiritual or temporal, are liable to an attachment for some contempts, as for rescuing a person arrested by due course of law, or for proceeding in a cause against the King's writ of prohibition, or for disobeying other writs wherein the King's prerogative or the liberty of the subject are nearly concerned; but it seems clear,

clear, that it is a certain general rule, that a peer is punishable in this manner for disobedience of all writs whatsoever; and it seems certain, that no peer is liable to an attachment for not *appearing on a jury*; therefore it seems, that what is said in some books in general, that an attachment lies against peers for *contempts*, ought to be understood of such only as are of an enormous nature, as those above mentioned, and others of the same kind, about which it is difficult to lay down any certain particular rules. 2 Hawk. Pl. C. 152. cap. 22. f. 33.

[ 291 ] 3. And upon *recovery against a bishop*, a man shall have elegit, Exigent does and not Ca. Sa. But exigent lies against a lord of parliament, if he be not certified lord of parliament. Ibid. not lie against an earl, duke, baron, nor countess. Ibid. pl. 37. cites 14 H. 6. 2.

4. And day of grace shall not be given against a lord of parliament. Ibid.

5. And lord of parliament shall not be sworn in an inquest. Ibid.

6. And where a lord of parliament or baron is at issue, he shall have 1 or 2 or more knights of his inquest, or otherwise the array shall be quash'd. Ibid.

7. Noy attorney-general in lectura Mr. Atkins, 1632. held that baron or earl ought to appear at the sessions of the forest, and that no immunity by common or statute law privileges him; and the reason is, because it is *suit real*, of which no subject shall be discharged, and the statute of Marlebridge mentions only *tourne of sheriff*, and it shall not be intended for forest. D. 314. b. marg. pl. 98.

8. Roll. Ch. J. said it is questionable whether a countess by patent only for her life be privileged from arrests or no. Sti. 234. Mich. 1650. Countess of River's Case.—Ibid. 254. S. C. Hill. 1650. Held not allowable; but adjournatur.

\* See Homine Replegiando.

9. Peerage is no privilege for taking an orphan contrary to the custom of the city of London. And in \* Hom. replegiando where he retains the body, he shall be committed. Lev. 163. Pasch. 17 Car. 2. B. R. Wilkinfon v. Bolton.

10. A bill of Middlesex was issued out of B. R. by an attorney of the Court against the countess of H. which was discharged by *superfedeas without pleading*; because it appeared by the record, that she was a *peeress*, and the attorney was committed for suing out the process. Vent. 298. Trin. 28 Car. 2. Anon.

11. Widows of peers are to have the privilege of peers not to be arrested; but as to privilege of parliament, it was determined both ways in 1676. See 2 Chan. Cases. 224. Anon.

A peer brought ejectment against some of his tenants, and mov'd for a trial at bar. The defendants mov'd that being a peer, and

12. In ejectment a special verdict was found on a trial at bar, and thereupon judgment for the defendant, and costs taxed; and after affidavit of the demand of the costs, a motion was made for an attachment against the dutchess (the duke being dead), she being one of the lessors, for non-payment of the costs; and it was alledged, that if the Court did not grant it, the defendant would be remediless; for tho' in other cases a distringas issues against peers, yet in this case no process can go but an attachment. But the Court refused to grant an attachment against the

the person of the dutchefs, but *ordered her to shew cause why an attachment, as to her goods and chattels, should not be issued*; which rule was afterwards made absolute. Rep. of Praet. in C. B. 7. 8. Hill 12. Ann. 1713. Thornby, on the demise of the Duke and Dutcheffs of Hamilton v. Fleetwood.

*liged to make some responsible person his lessee, or otherwise would waive his privilege.* But the Court rejected the motion; for if the plaintiff was worth nothing, he could not be compell'd to do so; and it would be unreasonable that his peerage should be a loss to him, since every subject has a right by birth to sue in the King's Courts where no distinction is to be made of persons. 3 Mod. 20. Mich. 7 Geo. 1721. Ld. Coningby's Case.

13. A peer, or lord of parliament, cannot *be an approver*; for it is against Magna Charta for him to pray a coroner. 3 Inst. 129. cap. 56. 2 Hawk. Pl. C. 205. cap. 24. f. 3.

(D) *Proceedings at Law, and in Equity.*

[ 292 ]  
Sec (C).

1. **I**N *debt* and *trespass* against a lord or a peer, *capias* does not lie; contra upon *contempt*. Br. Replevin, pl. 19. cites 11 H. 4. 15. Br. Process, pl. 35. cites S. C.

2. An *attachment* (was granted) against the Lord Cromwell. Toth. 76. cites 14 Eliz. Tavernor's Case. The like against the Lord Dacres. Toth. 76.

cites June, 37 Eliz. — So an attachment (was granted) against the Lord Barklay, at the motion of the Countess of Warwick. Toth. 76. cites June, 37 Eliz.

A peer of the realm *appeared to a bill in Chancery, but did not answer*; it was said, that formerly an attachment lay, but now, by order of the parliament, *no process lies but sequestration*. Comb. 62. October 29, 1687. in Chancery. Anon.

3. In case of goods of a peer taken on a *foreign attachment*, and removal of the cause into C. B. he *must find bail*, and the bail shall be liable to pay the condemnation. And for execution on a *Stat. Staple Merchant*, on the Stat. of Acton Burnel, or on the Stat. of 23 H. 8. the body of a baron shall be *taken in execution*; for by these statutes such persons were not exempted. 2 Le. 173. pl. 209. Trin. 29 Eliz. C. B. Harris v. Lord Mountjoy.

4. It was held that a nobleman shall be *bound with his bail in a recognizance* to render his body; and that upon the Stat. of 13 E. 1. if he hath not goods or lands, his body shall be taken in execution; for the law in such case excepts only clerks, 4 Le. 6. 29. Eliz. in C. B. Anon.

5. If a *bill in Chancery* be exhibited against a peer, the course is first for my Lord Keeper to write a letter to him; and if he doth not answer, then a subpœna; then an order to shew cause why a sequestration should not go; and if he still stands out, then a sequestration. Because there can be no process of contempt against his person, 2 Vent. 342. Mich. 22 Car. 2. Anon.

6. If, *during the time of privilege*, you want to proceed immediately

mediately against a privileged person, you must *either get him to agree to waive his privilege*, which in most cases (if he be a man of honour &c.) he will not refuse; *or you may petition the House* where he sits, that he may do so, and then he seldom refuses it; or if he does, the House, if it see cause, will order him to waive his privilege. Curf. Canc. 499. cap. 18.

7. Note, If the *waiver of privilege* be of his own generosity, or a voluntary act, it is necessary that you have it made *under his, or his solicitor's hand*, for your indemnity; for parol waiver, in such case, will not be sufficient. Curf. Canc. 499. cap. 18.

8. It is said, if a *trustee* be made a defendant here, he shall not have privilege, though he be a member of parliament. Quære. Curf. Canc. 499. cap. 18.

9. *Distressing* is the first process against a peer on an information for an *intrusion* on the King's lands, or for a *trover and conversion of the King's goods*. 2 Hawk. Pl. C. 284. cap. 27. f. 12. cites Co. Ent. 387.

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## (E) Sworn. In what Cases.

1. [N the pleas of parliament, 18 E. 1. between the Earl of GLOUCESTER and Earl of HEREFORD, John de Hastings a baron, upon long debate whether he ought to be sworn because he was a peer of the realm, it was resolved, that he ought to lay his hand to the book. The like was resolv'd 10 Car. in B. R. by the Court where the Lord Dorset's testimony was requisite. See D. 314. b. marg. pl. 98.

2. A bill was against a peeress to *discover deeds*, she answers on her *honour* and confesses deeds. She shall produce them only upon her honour and not on oath. Ch. Prec. 92. Pasch. 1699. Duke of Hamilton v. Lady Gerrard.

This privilege is restrained to an answer. Wms's Rep. 246. Trin. 1711. S. C.

3. Where a peer is to *answer to a bill*, his answer put in *on his honour* is sufficient; but where a peer is to answer *interrogatories*, to make an affidavit, or be examin'd as a \*witness, he *must be on his oath*, per Harcourt Ld. Keeper. 2 Salk. 513. in Canc. Sir Tho. Meers v. Ld. Sturton.

causes between party and party a peer that is a *witness must be sworn*. 2 Mod. 99. Trin. 28 Car. 2. C. B. Earl of Shaftsbury v. Ld. Digby—3 Keb. 611. S. C.—If he is not sworn, whatsoever he says is no evidence. But he cannot be compell'd to be sworn; per tot. Cur. Freem. Rep. 422, 423. Pasch. 1676. S. C.

## (F) Degraded.

S. C. cited Arg. Show. Parl. Cases 4. in Case of the King v. Ld. Pusebeck.

1. GEORGE Nevill, Duke of Bedford, was degraded by force of an act of parliament, 16 June, 17 Ed. 4. which act, reciting the making of the said Sir George duke, doth express the cause of his degradation, in these words *vis.* And forasmuch as it is openly known, that the said George hath not,

not, nor by inheritance may have any livelyhood to support the said name, estate and dignity, or any name of estate; and oftentimes it is so seen, that when any lord is called to high estate, and hath not convenient livelyhood to support the same dignity, it induceth great poverty and indigence, and causeth often-times great extortion, embracery and maintenance to be had, to the great trouble of all such countries where such estate shall happen to be. Wherefore the King, by advice of his Lords Spiritual and Temporal, and by the Commons in this present parliament assembled, and by the authority of the same, ordaineth, establisheth and enacteth, that from henceforth the same creation and making of the said duke, and all the names of dignity given to the said George, or to John Nevil his father, be from henceforth void and of none effect &c. In which act these things are to be observed. First, *That although the duke had not any possessions to support his dignity, yet his dignity cannot be taken from him without an act of parliament.* Second, *The inconveniencies do appear, where a great state and dignity is, and no livelyhood to maintain it.* Third, *It is a good reason to take away such dignity by act of parliament, and therefore the said act of the 28 H. 8. shall be expounded, according to the general words of the writ, to take away such inconvenience.* 12 Rep. 106, 107, in the Earl of Shrewsbury's Case.

\* Peer cannot be degraded but by attainder or act of parliament. 12 Mod. 56. Trin. 6 W. & M. the King v. Knowles.

### (G) Pleadings.

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1. **I**F a man be to plead his peerage, it is not necessary to have a writ, or to say that he is *unus parium regni*, but to plead the letters patents or writ of summons of his ancestor, and shew that he sat in parliament, and derive his pedigree from such ancestor. But a bishop who is seised of his barony in jure ecclesie, and is not noble in his blood, he ought to plead that he is *unus parium regni* &c. Skin. 521. Trin. 6 W. & M. B. R. in Case of the King and the Earl of Banbury.

### (H) Trial of Peers and Peeresses. By whom. In what Cases per Pares.

1. **I**N appeal against a lord, peer of the realm, he shall not be try'd by his peers, but as a common person shall be, and so it was adjudged before Fortescue against the Lord Grey of Codner. But upon indictment of felony, or of treason, he shall be try'd by his peers; for this is the suit of the King. Br. Corone, pl. 152. cites 10 E. 4. 6.

Br. Appeal, pl. 97. cites S. C. — Br. Trial, pl. 103. cites S. C. — S. P. And so it was done in the

LORD Dacre's Case, 33 H. 8. who was hang'd for felony, for the death of a man who was found in his company at a hunting in Suffex. Br. Trial, pl. 142. cites 33 H. 8. — There is a diversity between an appeal and an indictment; for appeal receives certain trial, which indictment refuses, viz. in appeal trial by battle is allowed, where in indictment it is not allowed. Also in indictment of treason or felony against a peer of the realm, the trial is by his peers, which manner of

of trial in appeal is not grantable. By which it appears that this trial by peers is the proper trial which belongs to a peer of the realm, when upon indictment of treason or felony he has pleaded Not guilty. Staunf. Pl. C. 153. cap. 1.—In a *præmunire* he shall be try'd by freeholders, notwithstanding it is at the King's suit. And so in appeal at the suit of the party for petit treason, murder, robbery, or other felony. 3 Inst. 30.—For the appeal cannot be brought before the Lord High Steward of England, who is the only Judge of noblemen in case of treason or felony. 2 Inst. 49.—And also it is not within Magna Charta, cap. 29. which extends only to the King's suit. Ibid.

At the common law in these four cases only a peer shall be try'd by his peers, viz. in treason, felony, misprision of treason, and misprision of felony; and the statute law which gives such trial, having reference unto these or to other offences made treason or felony, his trial by his peers shall be as before. But in case of a *præmunire*, the same being only in effect a contempt, no trial in this shall be of a peer by his peers; per Fleming Ch. J. 1 Bullf. 198. Pasch. 10 Jac. the King v. Ld. Vaux.

\* 2 Hawk. Pl. C. 413. cap. 44. f. 10. cites the same statute, and in f. 11. there the serjeant says, it seems agreed that a Queen, the King's consort, and also a Queen-dowager, whether she continue sole after the King's death, or take a second husband, be he peer or commoner; and also all peeresses by birth, whether they be sole, or married to peers or commoners, and also all marchionesses or viscountesses, are intitled to a trial by the peers, tho' none of them be expressly mentioned in this act, or in Magna Charta. But it is agreed, that a peeress by mar-

2. This manner of trial is given, as it seems, by the statute of Magna Charta, cap. 29. which is in this manner. *Nullus liber homo capiatur, vel imprisonetur, aut disseisetur de libero tenemento suo vel libertatibus vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ. Nulli vendemus, nulli negabimus aut differemus iustitiam vel rectum.* In this statute there is this word (homo) which includes as well male as female, and yet it has been intended of males only, as appears by a statute made anno \* 20 H. 6. cap. 9. the letter of which is thus. *Whereas it is contain'd in the Great Charter among others in the form following: Nullus liber homo capiatur, aut imprisonetur, aut disseisetur de libero tenemento suo, aut libertatibus suis, aut liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum mittemus, nec super eum ibimus, nisi per legale iudicium parium suorum vel per legem terræ.* In which statute there is no mention how femes, dames of great estate, by reason of their barons, peers of the land, coverts or sole, viz. dutchesses, countesses or baronesses, shall be put to answer, or before what Judges they shall be judg'd, upon indictments of treasons or felonies by them committed; for which cause there is a doubt in law, before whom and by whom such dames so indicted shall be put to answer and be judged. Our Lord the King willing to oust such ambiguities and doubts has declared by the authority aforesaid, that such dames so indicted, or after to be indicted of any treason or felony by them done or after to be done, though they are covert of baron or sole, that they thereof are put in answer and put to answer, and adjudged before such judges and peers of the realm as peers of the realm should be, if they were indicted or impeached of such treasons or felonies done, or after to be done, and in such manner and form and in no other. But none of those statutes have been put in use to extend to a *†* bishop or an abbot, though they have the name of the lord of parliament; for they have not this name of bishop or abbot *ratione nobilitatis*, but *ratione officii*; nor have place in parliament in respect of their nobility, but in respect of their possessions viz. the ancient baronies annex'd to their dignities. And according to this there are diverse precedents, of which the one was in the time of H. 8. and see || P. 10 E. 4. 6. that one of the peers indicted

of

of treason or felony, *may if the King pleases be arraigned thereof in parliament, and then the Lords Spiritual shall make a procurator for them, inasmuch as by the canonical law they themselves ought not to condemn any to death.* And tit. Corone, in Fitzh. P. 3 E. 3. P. 161. the BISHOP OF WINCHESTER was arraign'd in B. R. because he came to the parliament by summons, and departed without licence. Shard said, that a parliament is assembled for the profit of the King and of his people, then when one of the peers does not come, or departs without leave, this is a trespass as well to the Peers as to the King; and of things touching parliament, they shall be judg'd in parliament, judgment if you will take conufance here, which is a place more safe. Scrope said, those who are judges in parliament are judges of their peers. But the King has not a peer in his own land, by which he ought not by them to be judged, nor elsewhere make his suit against him who trespasses against him but there where it pleases him, by which &c. And note, that this trial by the peers holds place also where one of the peers of the realm is *indicted only of misprison of treason or felony*, in which trial the same form is to be observed, as shall be where any peer is indicted of treason or felony, and arraigned thereof. Staunf. Pl. C. lib. 3. 152. b. 153. cap. 1.

margin (b) says, in Fitzh. Corone 161. it seems admitted, that a bishop shall be tried by his peers in cases proper for such trials. But as to the Note out of Fitzh. Challenge 115. the Serjeant says it is mistaken; for that no such opinion is holden there.—And there f. 12. cites Staunf. 152. & 3 Inst. 30. that those who are lords of parliament, not in respect of their nobility, but of their baronies, which they held of the Crown, as bishops now do, and some abbots and priors did formerly, are not within the intent of Magna Charta, to be tried by the peers. And Selden seems clear, that this is the only privilege which bishops have not in common with other peers. And those, who seem most for the contrary opinion, admit that the law hath been generally so taken. Neither do they produce any precedent where a bishop or abbot has been tried by the peers upon a commission; but on the contrary admit that there are two precedents of their being tried by the country. And it is said by others, that there are diverse precedents of this kind; yet Selden with his utmost diligence, seems able to produce but two, which clearly and fully come up to his point, viz. those of Archbishop Cranmer and Bishop Fisher. However, it seems to be agreed, that while the parliament is sitting, a bishop shall be tried by the peers.—|| Br. Corone, pl. 152. cites S. C.

3. *Also this trial by the peers is given in case of indictment upon the statute, for speaking of seditious news, rumours or tales of the King or Queen*, as appears by the letter of the statute made anno 1 & 2 P. & M. cap. 3. Staunf. Pl. C. 153. b.

4. And note, that in every case or cases of *treason or felony newly made by statute*, the lords shall have their trial by their peers, notwithstanding that the statute does not provide for it by express words; so that the proviso inserted by the lords in every new statute, which makes treason or felony, seems only superfluous. Ibid.

5. And note, that the *number of peers who are to try every lord is twelve, and more as the King pleases, but not less than the number of twelve*, as common experience informs us. Ibid.

6. And note, that by the statute made anno 33 H. 8. cap. [ 296 ] 23. *it is ordained, that the King may award commission to hear and determine*

riage loses her dignity by marrying a commoner. + A bishop is a peer of the realm, and shall be tried by his peers upon arraignment of a crime. Br. Trial. pl. 142. cites Fitzh. Challenge. 115. But says, that the Bishop of Rochester was not tried by his peers in the time of H. 8. Ibid. — 2 Hawk. Pl. C. 424. cap. 44. f. 12. in the Notes in the

determine treason or murder in another county than where the treason or murder was perpetrated and done: In which statute there is a proviso for the lords to be tried by their peers; and such a proviso is in the statute made anno 35 H. 8. cap. 2. concerning treasons done out of the realm; which provisos in those statutes are necessary, in as much as those statutes are out of the course of the common law; and see the statute made anno 33 H. 8. cap. 20. for trial by the peers in cases of lunacy which is come to him who has committed treason, but this statute seems to be abrogated by the statute made anno 1 & 2 P. & M.; and see the statute of anno 33 H. 8. 12. concerning treasons, murders, or manslaughterers, perpetrated within the verge, where there is a proviso also for the peers to have their trial as they have had before the said statute. Staunf. Pl. C. 153. &c. cap. 1.

2 Hawk. Pl. C. 424. cap. 44. s. 13. the serjeant says, he

7. 1 E. 6. cap. 12. s. 15. enacts, That if any lord of parliament, or peer of the realm be indicted of any of the offences limited in this act, they shall have their trial by their peers. takes it to be agreed, that he has a right to be so tried upon an indictment of treason or felony, whether such treason or felony be made such by the common law or by statute; and also upon an indictment for a misprison of treason or felony; but says it seems that regularly he is to be tried by the country for all other crimes out of parliament, as praemunire, riot, seducing a young lady from her parents in order to debauch her &c.

8. 7 W. 3. cap. 3. Whereas by law in cases of life a commoner shall be tried by a jury of twelve freeholders, who must all agree before they can bring in a verdict to acquit or condemn the prisoner, but on the trials of peers or peeresses a major vote is sufficient.

8. 10. It is enacted, that upon the trial of any peers or peeresses, either for treason or misprison of treason, all the peers who have a right to sit and vote in parliament, shall be duly summoned 20. days at least before the trial, and every peer so summoned and appearing shall vote in the trial, first taking the oaths of allegiance and supremacy required by 1 W. & M. and subscribing and repeating the test enjoined by 30 Car. 2.

8. 11. Provided that this act shall not extend to impeachments, or other proceedings in parliament.

8. 12. Nor to the treasons of counterfeiting the coin, the great seal, privy seal, sign manual, or privy signet.

9. By 6 Anne, cap. 23. s. 12. Peers shall be indicted in Scotland as in England.

10. If a peer be impleaded by a commoner, yet such cause shall not be tried by peers, but by a jury of the country; for though the peers are the proper pares to a lord of parliament in capital matters, where the life and nobility of a peer is concerned, yet in matter of property, the trial of fact is not by them, but by the inhabitants of those countries where the facts arise, since such peers living through the whole kingdom could not be generally cognizant of facts arising in several counties, as the inhabitants themselves where they are done; but this want of having noblemen for their jury was compensated as much as possible, by returning persons of the best quality; therefore a knight

knight is necessary to be summoned in any cause where a peer is party. G. Hist. C. B. 78, 79. cap. 8.

11. It has been adjudged, that if a peer on an arraignment before the lords, *refuse to put himself on his peers*, he shall be dealt with as one that stands *mute*; for it is as much the law of the land, that a peer be tried by his peers, as a commoner by commoners; yet if one who has a title to peerage be indicted and arraigned as a commoner, and plead not guilty, and put himself upon his country, it has been adjudged, that he cannot afterwards suggest that he is a peer, and pray a trial by his peers. 2 Hawk. Pl. C. 425. cap. 44. f. 19.

Yet it is said that there is a record in 4 E. 3. that T. Lo. BERKLEY put himself on his country, and was [ 297 ] tried by a jury of

knight. Ibid. in marg.

## (I) Of the Order and Process of Trial of Peers.

1. THE order and process of this trial appears anno 1 H. 4. 1. & anno 13 H. 8. 13. That when a lord of the parliament is to be arraigned of treason or felony, of which he is indicted, the King by his letters patent shall make one great and sage lord to be the \* High Steward of England for the day of the arraignment, who before the said day shall make precept to his Serjeant at Arms (who is appointed to serve him during the time of his commission), to cause to come before him twenty or eighteen lords of the parliament at the same day; and after at the day when the Steward shall be under the cloth of state upon the arraignment of the prisoner, and has caused to be read his commission, the said serjeant shall return the said precept, and the lords shall be thereupon demanded, and when they have appeared, and are seated in their places, the Constable of the Tower shall be demanded to bring his prisoner to the Court, who shall be conducted by him to the bar, and then the said High Steward shall shew to the prisoner the cause for which the King has assembled there the lords and him, and command him to answer without any dread, and thereupon shall cause the Clerk of the Crown to read the indictment to him, and to demand of him if he be † guilty or not; to which after he has answered Not guilty, the clerk shall demand further of him, How he will be try'd? to which he may say; By God and his Peers; and immediately upon this the serjeants and King's attorney shall give evidence against him; to which when the prisoner has answered, the said constable shall be commanded to retire with the said prisoner from the bar to some place for the time that the Lords † secretly shall talk in the said court together: and thereupon the Lords shall rise from their places and consult together, and that which they do they do upon their honour without any oath to be administered to them; and when all of them, or the greater part of them are agreed, they shall return to their places and seat themselves; and then the High Steward shall demand of the ¶ youngest lord by himself, if he who is arraigned be guilty or not? and so of him who is next to

The indictment must be before commissioners of oyer and terminer or in B. R. if the offence be done in that county where B. R. sits. 2. [ See \* S. P. ] and the commission recites the indictment generally as it is found, and gives the High Steward power to receive and proceed on such indictment *secundum legem & consuetudinem*, and requires the peers to be attendant on him, and the Lieutenant of the Tower to bring the prisoner before him. 3. A certiorari is awarded out of Chancery to remove the indictment

the

ment itself before the High Steward indilate, which may either bear date the same day of the Steward's commission, or any day after.

the youngest, and so of the rest seriatim, till he has perus'd all; and each of the lords shall answer by himself; and then the said Steward shall send for the said prisoner, who shall be brought back to the bar, to whom the said Steward shall rehearse the verdict, and give \*\*\* judgment accordingly. Staunf. Pl. C. 152. lib. 3. cap. 1.

4. The Steward directs his precept under his seal to the Lieutenant of the Tower, to bring the body before him at such a day and place as he shall appoint. 5. He makes another precept under his seal to the Lieutenant of the Tower, expressing day and place when &c. 6. He makes a third precept under his seal to a Serjeant at Arms to summon tot & tales dominos, magnates, & proceres hujus regni Angliæ prædicti R. comitis E. pares, per quos rei veritas melius sciri poterit, quod ipsi personaliter compareant coram prædicto Seneschallo apud Westm. tali die & hora, ad faciend. ea quæ ex parte domini regis forent faciendæ &c. 7. At the day, the Steward with six serjeants at arms before him takes his place under a cloth of state, and then the Clerk of the Crown delivers to him his commission, who re-delivers the same unto him. And the Clerk of the Crown causes a serjeant at arms to make three Oyes, and commandment given in the name of the Lord High Steward of England to keep silence, and then is the commission read. And then the usher delivereth to the Steward a white rod, who delivereth the same to him again, who holdeth it before the Steward; then another Oyez is made, and commandment given in the name of the High Steward of England to all justices and commissioners to certify all indictments and records &c. which being delivered into Court, the Clerk of the Crown readeth the return. Another Oyez is made, that the Lieutenant of the Tower &c. return his writ and precept, and to bring the prisoner to the bar; † which being done, the Clerk reads the return. Another Oyez is made, that the serjeant at arms return his precept with

[ 298 ] the names of the barons and peers by him summoned, and the return of that is also read. Another Oyez is made, that all earls, barons and peers (which by the commandment of the High Steward are summoned) answer to their names, and then they take their places and sit down, and their names are recorded. And when they are all in their places, and the prisoner at the bar, the High Steward declares to the prisoner the cause of their assembly. Then the Clerk of the Court reads the indictment, and † proceeds to the arraignment of the prisoner, and if he pleads Not guilty, the entry is, Et de hoc de bono & malo ponit se super pares suos &c. Then the High Steward giveth a charge to the Peers, exhorting them indifferently according to their evidence. 8. The Peers are not sworn, but are charged super fidelitatis & ligeantis domino regi debitis, for so the record speaketh. 9. Then the King's learned counsel give evidence and produce their proofs for the King against the prisoner. 10. There are always either all or some of the Judges ever attendant upon the High Steward, and set at the feet of the Peers, or about a table in the middle, or in some other convenient place. 11. After all the evidence given for the King, and the prisoner's answers and proofs at large, and with patience heard; then is the prisoner withdrawn from the bar to some private place, under the custody of the Lieutenant &c. And after that he is withdrawn, the Lords that are triers of the prisoner go to some place to consider of their evidence; and if upon debate thereof, they shall doubt of any matter, and thereupon send to the High Steward to have conference with the Judges, or with the High Steward, they ought to have no conference either with the Judges or High Steward, but † openly in Court, and in the presence and hearing of the prisoner. 12. A nobleman\*\* cannot waive his trial by his peers, and put himself upon the trial of the country, that is, of twelve freeholders; for the statute of Magna Charta is, that he must be tried per pares. And so it was resolved in the Lord DACRE's Case. 13. The Peers ought to continue together (as juries in case of other subjects do) until they are agreed of their verdict. And when they are agreed, they all come again into the Court and take their places, and then the Lord High Steward publicly in open Court, beginning with the pious Lord (who in the Case of the Lord DACRE, was the Lord Mordant), said unto him, My Lord Mordant, Is William Lord Dacre guilty of the treasons whereof he hath been indicted or arraigned, or of any of them? And the Lord standing up said, Not guilty, and so upward of all the other Lords seriatim &c. 3 Inst. 28. 29. 30.

† This is to be intended when the parliament is not sitting, but is either dissolved or prorogued. 2 Hawk. Pl. C. 421. cap. 44. f. 3. marg.

‡ The gentleman goaler of the Tower carrying the axe before him. 2 Hawk. Pl. C. 422. cap. 44. f. 4.

§ But is not to insist on his holding up his hand. 2 Hawk. Pl. C. 422. cap. 44. f. 5.

¶ It was resolved by all the Judges in the Lord DACRE's Case, who was tried by commission, that no question ought to be ask'd of the Lord Steward or of the Judges in the absence of the prisoner. And it was adjudged by the Lord Steward, in the Earl of WARWICK's Case, who was tried by the House of Peers in parliament, that no question ought to be ask'd of the Judges in the absence of the prisoner. But in the Lord AUDLEY's Case, who was tried by commission, the Lords triers, after they were withdrawn, consulted with the Lord Ch. J. four several times, and also sent to consult with the Lord Steward. Yet, notwithstanding this precedent, the Judges resolved

in the Lord MORTLEY'S CASE, who was likewise tried by commission, that if after the Lords were withdrawn, they should send for any of the Judges to desire their opinions on a point in law, and the Lord Steward should permit them to go, they would tell the Lords, if they should ask them any question, that they were not to give any private opinion without conference with the rest of the Judges, and that openly in Court. But they resolved, that if the Lord Steward should ask them any question in open Court, tho' in the absence of the prisoner, they would answer it, because they are called to assist the Court, and the demand of any question in such case is to be referred to the discretion of the Lord Steward. 2 Hawk. Pl. C. 425. cap. 44. f. 20.

\*\*\* Contra Dal. 16. pl. 1. anno 1 & 2 Ph. & M. the Marquis of Dorset's Case.

\* Ld. Coke says, that in such cases there must be a Steward of England appointed. 3 Inst. 31. — But Serjeant Hawkins, 2 Hawk. Pl. C. 421. cap. 44. f. 1. in marg. says, that the necessity of making a High Steward to try an impeachment of high treason, was denied by the House of Commons, in the EARL OF DANBY'S CASE, and cites State Trials, 2 Vol. 198, 199.

†† S. P. Br. Corone, pl. 152. cites 10 E. 4. 6.

†† The Peers give their verdict in the absence of the prisoner &c. 3 Inst. 30. cap. 2.

†† S. P. Br. Corone, pl. 152. cites 10 E. 4. 6.

\*\*\* The Ld. Steward gives judgment according to the determination of the majority being more than twelve, but gives no vote himself on a trial by commission, but only on a trial by the House of Peers while the parliament is sitting. 2 Hawk. Pl. C. 422. cap. 44. f. 6.

2. If execution be not done according to the judgment, then the High Steward may by precept under seal command execution to be done according to the judgment; but in case of high treason, if all the rest of the judgment (saving the beheading, which is part of the judgment) be pardoned, this ought to be under the Great Seal of England. 3 Inst. 31.

3. And when the service is performed, then is an Oyez made for the dissolving of the commission; and then is the white rod, which has been born and holden before the Steward, by him taken in both his hands, and broken over his head. 3 Inst. 31.

4. When a peer is tried before the House of Peers in parliament, the Ld. Steward withdraws with the rest of the Lords and consults with them. 2 Hawk. Pl. C. 425. cap. 44. f. 21.

5. It is agreed, that where a peer is tried by the House of [ 299 ] Lords, in full parliament, the House may be adjourned as often as there is occasion, and the evidence taken by parcels; also, it has been adjudged, that where the trial is by commission, the Lord Steward, after a verdict is given, may take time to advise upon it; and that his office continues till he has given judgment. Also it was said to have been agreed by the Judges in the Ld. DACRE'S CASE, that on such a trial the Court might be adjourned, and that if the Lords triers did not agree, it was holden by some, they ought to be kept together all night, and by others, that they might go to their several houses. But it is said, that there is no precedent of the Lords triers ever having separated upon a trial by commission, after the evidence has been given for the King; and it is said to have been resolved by all the Judges in the Case of the DUKE OF NORFOLK, that the Peers in such case must continue together till they agree to give a verdict; and the like was adjudged by the Lord Steward in the Lord DELAMERE'S CASE. 2 Hawk. Pl. C. 425. cap. 44. f. 22.

(K) *What Advantages they may take on their Trials.*

By this statute a Lord of parliament shall have privilege of the clergy, where a common person shall not; as for house-breaking in the day or night, robbing any in the highway, and in all other cases excepted in this statute, except wilful murder. But in all other cases, in which clergy is taken away by statute made since this act, he is in the same degree as a common or inferior person is. And that by the words (be \*judged &c.) it appears that he must make his purgation, and if so then he must be delivered to the ordinary to be kept 'till he has made it. Also if lord of parliament *confesses the offence upon the arraignment, or abjures, or be outlaw'd for felony*, he shall not in any of these cases (as it seems) have benefit of this statute, inasmuch as he cannot make his purgation. Nor ought the Court to give him the benefit of this act, if the lord himself does not request it &c. Staunf. Pl. C. 130.—2 Hawk. Pl. C. 358. cap. 33. f. 109. and 360. f. 115.

2. If a question arise on the trial of a peer concerning the course of parliamentary proceedings, the Lords will not suffer it to be argued by counsel, but will debate it among themselves. 2 Hawk. Pl. C. 401. cap. 39. f. 6. cites State Trials, 2 vol. 694. 699.

3. If a peer of the realm bring an appeal, the defendant shall not be admitted to waive battel, by reason of the dignity of their persons. 2 Hawk. Pl. C. 427. cap. 45. f. 5.

[ 300 ] (L) *House of Peers ; Its Power over other Courts, and Power of other Courts as to Peers.*

A peer of the realm may be indicted in B. R. of felony or treason, and they shall be

1. IF he be indicted in the King's Bench, or the indictment removed thither, the nobleman may plead his pardon there before the Judges of the King's Bench, and they have power to allow it; but he cannot confess the indictment, or plead Not guilty to the Judges of the King's Bench, but before the Lord Steward; and the reason of this diversity, that the trial or judgment must be

be before or by the Ld. Steward, but the allowance of the pardon may be by the King's Bench, is, because that is not within the statute of Mag. Chart. cap. 29. 2 Inst. 49.

judges of the cause till he pleads Not guilty; for if he

does not appear, he may be *outlaw'd* in this Court; but when he has pleaded Not guilty, B. R. is not judge of the cause, but the High Steward. But a peer may *plead his pardon* in B. R. in as much as B. R. is judge of the cause 'till he has pleaded Not guilty; per Coke, Roll. R. 297. Hill. 13 Jac. B. R. *The King v. Ld. Morris*.

2. If a nobleman be *indicted*, and *cannot be found*, process of *outlawry* shall be awarded against him *per legem terræ*, and he shall be *outlaw'd per judicium coronatorum*, but he shall be tried *per judicium parium suorum*, when he appears and pleads to issue. 2 Inst. 49.

3. It is no new thing for our common law courts to examine matters of this nature, which concern proceedings in parliament; we do but follow the examples of our predecessors. In 38 Ed. 3. 14. the *bishop certified* to this Court, that the father and mother were *married*, but that the party was *born in adultery*; the Lords sent a writ to the Judges, and ordered them to *judge on the special matter*; but the Judges did not obey. In STANTON's Case, 15 Ed. 3. F. Vouch. 109. the Lords commanded the Court of Common Pleas to give a judgment; the Ch. J. refused; after in his absence the others complied, and gave judgment. B. R. afterwards examined the proceedings of the Lords, and adjudged them void, as appears 15 Ed. 3. 1. 2. in the Oxford Library. We are not to delay the justice of the land, and the law of it is our rule. Per Holt Ch. J. 12 Mod. 64. in Case of the King v. Knowles.

4. It seems clear, that if a peer be *attainted* of treason or felony, he may be *brought before the King's Bench*, and *demand*, *what he has to say why execution should not be awarded* against him? and if he plead any matter to such demand, *his plea shall be discussed*, and execution awarded by the said Court, upon its being adjudged against him. 2 Hawk. Pl. C. 424. cap. 44. l. 18.

[For more of Peer in general, see Error, Parliament, Presentation, and other proper Titles.]

## (A) Penal Bill.

1. [ F I bind myself to pay 20l. on such a day, and in default to pay 40l. the 40l. must be paid *without any demand*; per Hale Ch. J. Mod. 89. Mich. 22 Car. 2. B. R. in Case of Bradcat v. Tower.

2. Debt for 20l. plaintiff declares, that whereas the defendant by a certain bill obligatory *cognovisset se debere &c. summam viginti librar' solvere querenti &c.* ad vel super 29 diem Septembris 1685, *pro vera solutione* 10l. ipse (the defendant) obligasset se firmiter per eandem billam, & in facto dicit quod defendens non solvit to the plaintiff the said 10l. upon the said 29th of September, per quod actio accrevit; defendant demurr'd. Judgment pro quer.; for tho' it is *drawn properly as a penal bill*, for the payment of the 10l. yet there is enough to ground an action of debt for the 20l. and the day of payment seems to refer to the 20l. 2 Vent. 106. Mich. 1 W. & M. C. B. Bond v. Moyle.

[For more of Penal Bill in general, see Conditions, Obligations, and other proper Titles.]

## Penalty.

(A) *Penalty of Bonds, &c. Relieved or enlarged.*  
And what shall be said a Penalty.

The like favour is extendable against them that will take advantage upon

1. [ F A man be bound in a penalty to pay money at a day, and place, by obligation, and *intending to pay the same, is robbed by the way*, or hath intreated by word, some further respite at the hands of the obligee, *or cometh short of the place by any misfortune*; and so failing of the payment, doth nevertheless provide

*vide and tender the money in short time after*; in these, and many such like cases, the Chancery will compel the obligee to take his principal, with some reasonable consideration of his damages (*quantum expedit*); for if this was not, men would do that by covenant, which they do now by bond. Cary's Rep. 1.

any strict condition for undoing the estate of another in lands upon a small or trifling de-

fault. Cary's Rep. 1.—So if two be jointly and severally bound to pay money; and the obligee will give longer day (or other favour) to the one, and then will sue the other for the debt, he who is sued shall sue in Chancery. Cary's Rep. 2. cites 9 E. 4. 41.

2. If the obligee have received the most part of the money payable upon the obligation, at the peremptory time and place, and will nevertheless extend the whole forfeiture immediately, refusing to accept of the residue tendered unto him soon after the default, the obligor may find aid in Chancery. Cary's Rep. 2.

3. A. sold a rectory to J. S. and his heirs, with warranty, and enter'd into a recognizance of 1000*l.* for quiet enjoyment; J. S. was disturb'd, and so the recognizance was forfeited. Tho' (as it seems) J. S. sustained greater loss than 1000*l.* yet Chancery cannot relieve beyond the penalty of the recognizance. Chan. Rep. 95. 11 Car. 1. Bidlake v. Lord Arundell.

4. The plaintiff and defendant were fishmongers, and had contiguous shops; and differences having been between them, they were made friends, and by that mediation the plaintiff was to give, and did give, the defendant a bond of 20*l.* penalty conditioned to behave himself civilly and like a good neighbour to the defendant, and not to disparage his goods. The plaintiff afterwards asked the defendant's customer whilst cheating a parcel of flounders, why he would buy of the defendant, and told him those fish stunk, and so the defendant lost that customer; and the defendant having sued the bond, and assigned that for breach, had a verdict. And to be relieved against that verdict, and the penalty of the bond, the plaintiff brought his bill. The defendant demurr'd; for that the bond was not conditioned for payment of money, or performance of covenants, or for any matter for which damages in an action of debt, covenant, or any other action, was recoverable; nor was there any way to measure the damages but by the penalty, and the bond being to preserve amity and neighbourly friendship, for the breach of which the plaintiff did submit to pay that penalty, there cannot be any trial had to measure the damages for breach of the condition, other than the parties have submitted to. His Lordship declared, that as this case was, the penalty being but 20*l.* he did not think fit to put the defendant to answer, for that the costs of suit here, and at law, would exceed the penalty; and so the demurrer was allowed. But he likewise declared this was not to be a precedent in the case of a bond of 100*l.* or the like; and though the demurrer was allowed, the defendant was to have no costs. Chan. Cases, 183, 184. Mich. 22 Car. 2. Tall v. Ryland.

5. The factors of the East India Company enter into covenants to the Company with great penalties to pay extravagant prices.

Ld. Keeper compared this to a co-

venant by a lessee, that if he break up or plough such lands, he shall pay 5*l.* for every acre; and said that there never was any relief yet given in this Court against such a covenant.—*Ibid.* 122.  
 —2 Chan. Cases 198.  
 Trin. 26 Car. 2. S. C. And bill dismissed, tho' it was objected that this covenant was a greater penalty than a bond of double the value.—S. P. as to the excessive overvalue, and the defendant was ruled to answer, tho' it were a penalty. 2 Chan. Cases 218, 219. Pasch. 28 Car. 2. East India Company v. Mainston.

I have ventured to alter the state of this case, but in such a manner, that if the reader dislike it, he may, if he please, take it as in the original, by leaving out what is marked within the crotchets.—Where an action is brought for freight and

6. D. [was] executor of C. [who was] employed as a *master of a ship* by the East-India Company, [and enter'd into] *covenants* with them to pay a certain *mulct* for every cloth carried &c. in the ship, and took [E. the testator of] *the defendant to be his mate, who made an agreement mutatis mutandis with [C. the testator of] D. and gave a bond of 50*l.* for due performance* on his part; but he, without [C. the testator of] D.'s knowledge, carried so many cloaths as the *mulct came to 70*l.** which the Company deducted out of [C. the master's] the wages, and [which] the 50*l.* bond would not satisfy; and therefore [E. the mate being dead, D. as executor of C. the master] pray'd relief and discovery of [E.] the testator's estate. The defendant demurred; because the relief [prayed was] of more than [the] security by bond [was given for, and that this was] not proper in equity; and ruled accordingly. Chan. Cases 226. Pasch. 26 Car. 2. Davis v. Curtis.

and damages, and the same is laid to double the sum of the penalty upon the charter party, tho' more is recovered than the penalty in damages, yet execution shall be stinted to that penalty. Fin. R. 435. Mich. 32 Car. 2. Bettisworth v. Clerk and Archer.

7. A. binds himself and his heirs in a *bond of 40*l.* penalty conditioned to pay 200*l.** to B. B. su'd and was relieved; but it was too late objected that the heir could not be bound but by writing, and this writing binds him but in 40*l.* and the executor could not pay it but by a decree without a *devastavit* to other creditors. Per Finch. C. when the plaintiff has judgment here he shall have the same advantage as at law. 2 Chan. Cases 225. Hill. 28 and 29 Car. 2. Sims v. Urry.

8. The plaintiff was in execution upon a judgment obtained on a bond

a bond; and being thus in execution, the *principal* sum and *interest*, and *costs* were tendered to the obligee, but he would not discharge him out of execution without paying the whole penalty of the bond; and thereupon \* the plaintiff exhibited his bill to be relieved against the said penalty, which he had paid to the said obligee. The Court ordered him to *refund the overplus* of the money. Fin. R. 437. Mich. 31 Car. 2. Friend v. Burgh.

9. A *surety*, that is not bound by law, shall not be made liable in equity. 2 Chan. Cases 22. Hill. 31 and 32 Car. 2. Simpson v. Field.

10. A. acknowledged a judgment of 2000 l. penalty *deceased* for payment of 1300 l. *principal money and interest*. No interest was paid in many years, and several proceedings were had in equity and at law; and on a bill now brought, the defendant *pleaded* the former bill and proceedings; and that after an account taken in the former cause, the plaintiff proceeded at law, and *reviv'd* his judgment by *scire facias*, and had taken *execution* by *elegit*, and *thereupon the defendant had brought the whole penalty of the bond into C. B. and insisted that a Court of Equity ought not to charge him beyond the penalty of the judgment*. And this plea was allowed by the Court. Vern. 349. Mich. 1685. Hale v. Thomas.

Not but that equity may, and in many cases doth, carry the debt beyond the penalty of the security; as where the party hath been delayed by injunction of this Court, and the like; but

it was observed, that where it has been so done, it has been always against a plaintiff, when he *can* come for relief. But there is no precedent where a plaintiff in this Court shall charge a defendant beyond the penalty, and further than he could charge him at law. But in this case the Court allowed the plea, principally because the plaintiff, after the account taken in the former cause, had surceased his prosecution in this Court, and proceeded at law, having sued forth a *scire facias* on his judgment, and taken forth execution; and therefore having elected to proceed at law, he should not now resort back to equity; especially as this case is, where he hath taken execution by *elegit*, which charged a moiety of the lands only, and now would come for a decree in equity for the same debt, which would charge the person and the whole estate, and therefore the Court allowed the plea. Vern. 350. Mich. 1685. Hale v. Thomas.—2 Chan. Cases 182. S. C.

11. A. entred into *bond* of 140 l. penalty, conditioned for *payment* of 72 l. After many delays in suits by privilege &c. and relief prayed against the bond upon suggestions of fraud, want of consideration &c. it was ordered upon the hearing, that the defendant should not be relieved but against the penalty only; and that it be referred to the Master to compute the principal and interest due, and to tax the plaintiff's costs both at law and in equity; and that what should be found due, be paid, when and where the Master should appoint. The Master computed the *principal and interest* at 154 l. and the *costs* at 7 l. and to be paid the 20th of October following. Upon this the defendant appealed to the House of Lords, where one question was, whether Chancery could justly award *more than the penalty*? and objected, that the order being to save against the penalty, no more ought to have been decreed. But it was said that, notwithstanding that, when the same was referred to a Master to tax principal and interest, the order bound the party to pay both, tho' more than the penalty; and the meaning of the first part was only to relieve against the penalty in case the principal and interest came

to less than the penal sum; especially the same coming to be heard upon cross-bills, and as this cause was circumstanced after such delay &c. And as to costs, held that there was no cause for an appeal in this case; nor in truth was it ever known to be a cause, if the merits were against the party appellant. And so the decree was affirmed in the whole. Show. Parl. Cases 15. Duval v. Terry.

12. A. has judgment for the penalty of a bond. The question was, if payments formerly made to A. out of brigadier's pay assigned as a security to A. should be applied first to pay the interest then in arrear, and afterwards the principal; and so A. to have now the benefit of the penalty to recover what remained due? Wright K. thought, that including what had been paid, tho' at several payments, and many years since, A. should have in the whole no more than the penalty of the bond; saying, *a man can have no more than his debt*, and the penalty is the utmost of the debt. Tamen quære. 2 Vern. 509. Trin. 1705. Steward v. Rumball.

[ 304 ] 13. A. by marriage articles was to pay 50*l.* at 5*l.* per ann. till the whole paid; and in failure of payment of any 5*l.* then to pay the whole. Upon failure, the whole is due, and no part of it is a penalty, only defendant had time for payment by parcels, the benefit whereof is now lost. 8 Mod. 56. Trin. 7 Geo. Anon.

[For more of Penalty in general, see Conditions, Obligations, and other proper Titles.]

## Pensions.

(A) *In what Court to be sued for, and against whom Action lies.*

1. According to Ld. Coke's opinion, 32 H. 8. cap. 7. gives remedy in the Temporal Courts, not only for tithes, but for pensions also, and other ecclesiastical or spiritual profit, where the owner is disseised, deforced, wrong'd, or otherwise kept out, or put from the same; because by their coming to the Crown by the statutes of 27 H. 8. 31 H. 8. 37 H. 8. and 1 E. 6. they are become temporal inheritances in the hands of laymen, and

and shall be accounted assets, and husbands shall be tenants by the curtesy, and wives endowed of them, and shall have other incidents belonging to temporal inheritances, only that they retain this ecclesiastical quality, that the owner of them may sue for the subtraction of them in the Ecclesiastical Court. Watf. Com. Inc. 8vo. 1049. cap. 53. cites Co. Litt. 159. a.

2. 34 and 35 Hen. 8. cap. 19. f. 4 enacts, That if any occupier of any lands, or other hereditaments of the late monasteries, out of which any portions, pensions, corodies, indemnities, synodics, proxies or other profits, have been paid to any archbishops, bishops, archdeacons, and other ecclesiastical persons, wilfully deny the payment, whereof the said archbishops &c. were in possession within ten years before the dissolution of such monasteries, &c. it shall be lawful for the same archbishops &c. to make such process, as well against every such person as shall so deny payment, as against the churches charged with the same, as heretofore they have lawfully done; and if the defendant be convicted according to the ecclesiastical laws, the plaintiff shall recover the thing in demand, and the value thereof in damages, with costs.

This act enables spiritual persons to sue laymen for pension, in the Spiritual Court, Godb. 197. In Case of Sprat v. Nicholson. —Note, that this statute gives remedy only for pensions,

and other dues that did arise out of lands &c. which came to the Crown by the statute of dissolutions; and therefore damages and costs are not to be had by the aid thereof, upon suits for other pensions &c. And it gives relief only for such payments, of which bishops, and other spiritual persons, were in possession at, or within, 10 years next before the dissolution of the house to which the thing belonged, by reason of which the duty is demanded; wherefore such duties, which have not been usually paid within memory, are not now recoverable, unless by the general saving in stat. 31 H. 8. c. 17. by English bill in the Exchequer or Chancery; (quære). But if they have been usually paid, it will then be presumed that they were due and paid at the time of the dissolution, and so are recoverable with costs and damages by this statute; whence it follows, that bishops &c. are not relieved by the statute upon a title shewed by deed only, without prescription. Watf. Comp. Inc. 8vo. 1054. cap. 53.

S. 5. If the cause be determinable at common law, the party grieved shall sue at common law; and if the defendant be condemned, the plaintiff shall recover the thing in demand, and the value thereof in damages, with costs.

Provided, that if the King hath demised any of the said lands with a covenant to discharge the tenant of such charges, that then the party claiming the same, shall sue for them in the Court of Augmentations, and not elsewhere. [ 305 ]

3. If a suit be to be brought for a pension, or other thing, due out of a parsonage &c. it seems the occupier, tho' a tenant, ought to be sued; and if part of the rectory be in the hands of the owner, and part in the occupation of a tenant, the suit is to be against them both. Watf. Comp. Inc. 8vo. 1055. cap. 53. cites 1 Le. 11. Mich. 25 and 26 Eliz. C. B. Sutton v. Bowfel.

Le. 10, 11. pl. 12. Sutton v. Dowle.

4. The church of B. in the time of H. 3. was appropriated by the bishop of Sarum, and the vicar was then endowed. And, upon the endowment, the bishop made an ordinance by these words: *Statuimus & ordinamus*, that the vicar shall pay annually 20l. de fructibus vicarie to the precentor in the church of Sarum, to the use of the vicars chorals within the same church. And for this pension a suit being depending in the Spiritual

Court, and a prohibition thereupon brought, consultation was now pray'd; because it is a mere pension *feasible* in the Spiritual Court, and cited 11 H. 4. 85. Fitzh. N. Br. 51. Tanfield *e contra*, that it is an annuity, and that annuity lies properly for it in the King's Courts; and in proof thereof was cited 19 Ed. 3. Jurisdiction 28. that annuity lies for a pension by prescription: and that the statute of Circumspecte agatis, Prohibition third, is but an ordinance, as there it is said. So Ed. 4. 12. of an annuity granted for composition for tithes, and 20 Ed. 3. Annuity 32. a writ of annuity was brought for such a pension as ours is, wherefore &c. But all the Court resolved, that the suit was well brought in the Spiritual Court; for Popham and Fenner said, that there would be a difference, where the ordinary ordains such a payment as judge, there the suit shall be in Court Christian; and where the patron and ordinary make a grant in the time of the vacation, for there they charge as an interest; and Gawdy said, that for such a pension suit might be either in this, or the Spiritual Court. And that it is not denied by 20 Ed. 3. and so is Nat. Br. Whereupon consultation was granted. Cro. E. 675. Trin. 4. Eliz. B. R. Collier's Case.

5. Annuity *by prescription* for a pension issuing out of the church of S. it was resolved without argument, that it lay *against the incumbent*, as well *for arrears due in his predecessor's time*, as in his own time; for the church itself is charged into whose-soever hands it comes. Cro. E. 810. Hill. 43 Eliz. C. B. Trinity College in Cambridge, v. Tunstall.

6. Sub-deacon of Exeter did libel in the Spiritual Court against N. parson of A. pro annuali pensione of 30 l. issuing out of the parsonage of A. and in his libel shewed, how that tam per realem compositionem, quam per antiquam & laudabilem consuetudinem, ipse & predecessores sui habuerunt & habere consequerunt predictam annualem pensionem out of his parsonage of A. Dodderidge serjeant mov'd for a prohibition in this case, because he *demands the said pension upon temporal grounds, viz. prescription and real composition*. But Cook Ch. J. and the other Justices were of opinion, that in this case no prohibition should be granted; for they said, that the party had *election* to sue for the same in the Spiritual Court, or at the common law, *because both the parties were spiritual persons*; but if the parson had been made a party to the suit, then a prohibition should have been granted, and cited Fitz. Nat. Brev. 51. b. acc. And they further said, that if the party *sueth once at the common law* for the said pension, and afterwards *sues in the spiritual court* for the same, that a *prohibition will lie*; because by the first suit he hath determined his election. Godb. 196. pl. 283. Trin. 10 Jac. C. B. Sprat v. Nicholson.

[ 306 ] 7. Vicar sues the parson in the *Spiritual Court* for a pension, and prohibition deny'd; for it is a spiritual thing, for which he may sue in the Spiritual Court. Note, Defendants intituled themselves to that parsonage by a grant of H. 8. who had it by the gift of H. 8. of dissolutions, Nov. 16. Goodwin v. the Dean and Chapter of Wells.

8. A pension out of an appropriation, tho' by prescription, is sueable in the Spiritual Court; for it could not begin but by the grant and institution of spiritual persons, and therefore if the duty be traversed, it may be tried there. Per Holt Ch. J. 1 Salk. 58. Pasch. 12 W. 3. B. R. Smith v. Wallis.—Ibid. cites Vent. 120. Cro. E. 675. where it is a pension by ordinance of the bishop acting as judge, ordinamus & constituimus; and where by concurrence of the bishop's co-operating with the patron. —See pl. 4.

But if a mandamus decimandi be pleaded, it shall be tried at common law, and if it be not found, a consultation shall go; per Holt.

12 Mod. 397. Pasch. 12 W. 3. Anon.

9. In vacation, patron and ordinary may grant a pension, and parson shall be sued there for it; and upon the statute of *Circumspecte agatis*, a prohibition was never granted in that case; tho' Co. in his comment. upon that statute, be of a contrary opinion. Per Holt Ch. J. 12 Mod. 405. Trin. 12 W. 3. in Case of Stone v. Jones.

[For more of Pensions in general, see Prohibition, and other proper Titles.]

## Perambulation.

1. *A WRIT de perambulatione facienda* ought to be sued with the assent of both parties. Where they are in doubt of the bounds of their lordships, or of their towns, in such case then they by assent may sue the writ directed unto the sheriff to make the perambulation, and to set the bounds and limits between them in certainty. F. N. B. 133. (D).

2. The King may make his commission to other persons to make that perambulation, as well as to the sheriff, and to certify the same in the Common Pleas or in the Chancery, or elsewhere, &c. And such commission is oftentimes \* granted to make perambulation of three or four counties, where they are in doubt as to the bounds and limits thereof; and this perambulation made by assent shall bind all the parties and their heirs. F. N. B. 134. (A).

\* Note, a division was made between the counties C. and H. by an inquest taken of four counties by force

of a commission; and resolved, 1st. That if land lying in the town of A. but in truth within the county of C. be allotted to the county of H. that they shall still remain of the town of A. as before. 2dly. That this shall not conclude any of the county of C. to suppose by writ, or otherwise, that was

lands are in the county of C. 3dly. If they are at issue on this point, it shall be tried by a *verneis* of both counties. *Quere.* 29 E. 3. 45. F. N. B. 134. (A), in the notes there (2).

3. *But if tenant for life be of a seignory, and another who is tenant in fee-simple of another seignory adjoining, sue forth such a writ or commission, by reason whereof a perambulation is made, it seemeth the same shall not bind him in reversion; neither shall the perambulation made with the assent of tenant in tail bind his heirs.* F. N. B. 134 (B).

4. And the perambulation may be made for divers towns, and in divers counties, and the parties ought to come in person into Chancery, and there acknowledge and grant that a perambulation be made betwixt them, and the acknowledgment shall be enrolled in the Chancery, and thereupon a commission or writ shall issue forth. And if the parties cannot come into Chancery, then they ought to sue forth a writ of *dedimus potestatem* directed to certain persons to take their acknowledgment, and to certify the same into the Chancery under his seal &c. and then upon that certificate returned into the Chancery, that commission or writ may be granted, altho' the parties do not appear in person in Chancery to pray the same. F. N. B. 134 (C).

[ 307 ]

Cro. F. 441.  
S. C. according to their usage, and

may abate all nuisances in their way, cites F. N. B. 185. (B), and Book of Entries 158.

5. There is no question but parishioners may justify going over any body's land in their perambulation. Per Anderson. Owen 72. Goodway v. Michel.

6. A libel was in the Ecclesiastical Court, that all farmers of such a farm had used to find cakes and ale at the perambulation of the parish to the value of 8s. or thereabouts; a motion was made for a prohibition, and the custom denied; but adjudg'd, that no consultation should go. For a custom for farmers is no more than a prescription for occupiers, which is not good where it is to charge the land. But the objection of uncertainty as to the (or thereabouts) is not material; for all their proceedings are so, 2 Lev. 163. Hill. 27 & 28 Car. 2. B. R. Welby v. Herbert.

[For more of Perambulation in general, see Manwood's Forest Law, tit. Boundaries of the Forest, and see Forest supra, and other proper Titles.]

## Perjury.

## (A) At the \* Common Law.

[1. IF a man makes a false oath in any Court of Record, this is perjury at the common law before the statute, for which he may be indicted.]

\* There was no course at common law to punish perjury, but yet before the stat.

King's council used to assemble and punish false oaths of witnesses at their discretion; and it appears by D. 27. that at common law there was no punishment for perjury but in case of attain; but in the Spiritual Court, *pro lesione fidei*, they are used to punish them. Cro. E. 521. Dampson v. Simpson.

[2. If a man makes a false oath in any judicial proceeding in any Court, though it be not a Court of Record, yet it is perjury at the common law, for which he may be indicted; because it is a great offence, it being a great means of injustice.]

[3. If a man makes a false oath extrajudicially, not in any Court of Record, nor in any judicial proceeding in any other Court, this is not perjury at common law for which he may be indicted, though it be a false oath.]

[4. If a man makes a bargain for any thing, and voluntarily swears the thing to be his own, or that he has good title to it, though it be false, yet it is not perjury for which he may be indicted, because it is not done in any judicial proceeding.]

[5. If a Justice of peace, or constable, or other officer who is sworn to execute his office duly, does not do it according to his oath, yet it seems this is not perjury for which he may be indicted; but he may be indicted for the offence against his oath.]

If a Mayor makes a false return, the party may indict him for perjury

upon the general oath taken by him when he was admitted into his office; per Cur. Nov. 92. in the Case of Alderman Harris of Oxford. — And where, upon an information against a sheriff for a false return of a knight of a shire, it appeared upon examination, that he did not take the oath of office at his entry upon it, being persuaded by one H. not to do it by reason of the difficulty of the articles, [so that he could not be condemned as guilty of perjury, yet] he and H. were both punished by fine and imprisonment for the contempt, and the sheriff was further fin'd and imprisoned for the false return. D. 168. b pl. 19. Trin. 1 Eliz. Bronker's Case.

[6. In an indictment of perjury, if it be alleged that there was a suit in Chancery between A. and B. and thereupon a commission issued to examine witnesses \* which was executed; and after the defendant made a false oath before Master Page, one of the Masters of the Chancery, who had power to take an oath, and so the defendant made corrupt and wilful perjury; this indictment is not good, because it does not appear that Master Page had power to take an oath in this case, but only an oath which might be in other

[ 308. ]  
See (C) —

\* Fol. 258.

Upon an indictment for perjury assigned in an affidavit

made before Sir Robert Rich, exceptions were moved for the quashing it. 1st, It is not laid, that Sir Robert Rich was a Master in Chancery. 2dly, That this is no perjury within the statute of 5 Eliz. cap. 9. And 3dly, Because he concludes this to be *contra formam statuti* of 5 Eliz. for perjury in this affidavit, which is not within the statute. Curia allowed of these exceptions, and for these exceptions, by the rule of the Court, the indictment was quash'd and the party discharged of it. 3 Buls. 322. Hill. 1 Car. B. R. The King v. Bell.—An action upon the statute was brought upon this same oath: the court was, that the defendant came to Rich a Master in Chancery having authority to take affidavits &c. and made a false affidavit, but he did not allege that the affidavit was in Chancery in curia cancellarie, which the Court said he ought to have done, or otherwise it is no perjury within the statute. Lat. 38, 39. Anon.

3. P. At common law, whether he be believed or not. 1 Hawk. Pl. C. 172. cap. 69. f. 1.—One was su'd in the Star-Chamber for perjury in the Court of Requests upon a deposition there, relating to a title of land and frankment in question there; and it was resolv'd by all the Justices of England, that this perjury is not punishable; for this was only a vain and idle oath, and not a corrupt one, because the Court of Requests had no power to examine titles of lands, which are real, and they are to be discuss'd and determin'd in the King's Courts. Quod nota. Yelv. 111. Mich. 5 Jac. B. R. cited by Williams J. as Paine's Case.

If a witness be examin'd after the demise of the King upon a commission gran'd in the King's lifetime, and he is perjur'd upon such examination; tho' legally the commission was determined by the demise of the King, yet the commissioners not having notice of such demise the witness was held to be duly sworn, and was punishable for perjury in such examination by the statute; for that what the commissioners did was legal being before notice. Cro. C. 97. Mich. 3 Car. Sir Randolph Crew v. Vernon.—1 Hawk. Pl. C. 174. cap. 69. f. 4.

8. P. 5 Mod. 348. Trin. 9 W. 3. the King v. Greep.—Serjeant Hawkins says, Perhaps the books wherein this opinion is holden, ought to be intended only of such affidavits which no way relate to the cause depending in suit before such Court; for if they be of such a nature, that either of the parties in variance be grieved &c. by reason of the perjury; as where a trial is put off, or a judgment or execution set aside upon a false affidavit, the offence seems to be not only within the meaning of the statute, but also within the very letter of it, unless the words (witnesses and depositions) are confined to so strict a signification as to bear no kind of application to any other persons or oaths, except those which are made use of upon the trial of the issue in question. 1 Hawk. Pl. C. 180. cap. 69. f. 21.

8. C. Palm. 294. by the name of Ockley and Whiteley's Case.—Hec. 97. 3. If for a false affidavit an action does not lie upon the statute of perjury, yet he may be indicted for this perjury at the common law; for by such false affidavits made in the Star-Chamber, Chancery, and B. R. and other courts, several persons are greatly vexed. Per Coke Ch. J. Roll. R. 79. pl. 22. Mich. 12 Jac. B. R. Anon.

9. J. S. was to prove a matter relating to himself; J. S. and one T. S. procur'd one W. R. a knight of the post to swear for J. S. who swore he knew that the said J. S. did the thing. It was very true that J. S. did the thing, but W. R. did not know it, nor did he know J. S. This was said by the Chief Justice to be perjury;

jury; but he and the other Justices held, that it is only punishable as misdemeanor, and that by the common law. 2 Roll. R. 244. Mich. 20 Jac. B: R. Whickley's Case.

Pasch. 4 Car. C. B. says, it was agreed \* by the

Court in one *STYLES'S CASE*, that tho' a witness swears true, yet if it be not true of his own knowledge it is a corrupt oath within the statute.—But in the Case of the *KING v. HINTON & BROWN*, the Court said, that there was a difference when a man swears a thing which is true in fact, and yet he does not know it to be so, and where he swears a thing to be true which is really false. The first is perjury before God, and the other is an offence of which the Law takes notice. 3 Mod. 122. Hill. 2 & 3 Jac. 2.—But such false oath was punish'd in the Star-Chamber, as where damages were awarded to the plaintiff in the Star-Chamber, according to the value of his goods riotously taken away from the defendant; the plaintiff caused two men to swear the value of the goods, that never saw nor knew them; and though that which they swore was true, yet because they knew it not, it was a false oath in them, for the which both the procurer and the witnesses were sentenced in the Star-Chamber. 3 Inst. 166. Mich. 9 Jac. in the Star-Chamber. *Gurnai's Case*.—1 Hawk. Pl. C. 175. cap. 69. s. 6.

10. Adjudged by the Court, that a man cannot be punished by the statute of 5 Eliz. cap. 9. for perjury in *his\* own cause*, as † *wager of law* &c. but for that he shall be *indicted at common law*, and it was commanded to be so observ'd from henceforth, and that it has been so adjudged. Noy. 128. Sir Robert Miller's Case.

—\* S. P. Either in an answer to questions put to him in a court of law or equity having power to

purge him upon oath concerning his knowledge of the matter in dispute, or in his affidavit concerning some collateral matter, wherein the parties own oaths are allowed to be taken. But it seems, that a juror who gives a verdict contrary to manifest evidence is not properly guilty of perjury within the above-mentioned description, because he is not sworn to depose the truth, but only to give a true judgment upon the deposition of others, and in many cases is not punishable at all in foro humano. 1 Hawk. Pl. C. 174, 175. cap. 69. s. 5.—† S. P. Vent. 296. Trin. 28 Car. 2. B. R. Anon.

11. A. was convicted of perjury by verdict, for swearing *that he was servant to J. S.* where in truth *he was only servant to the servant of J. S.* And for this oath Roll fin'd him 10 l. though Wild mov'd for an abatement, because it was not malicious, and said that one TYLER in like case was fin'd but 5 l. All. 79. Trin. 24 Car. B. R. Anon.

12. An *equivocal oath*; as where a man having *roll'd up a declaration in ejectment* like a piece of a tobacco-pipe, hid it in his box, and after delivered the box to the tenant in possession, and after swearing the delivery of a declaration &c. he was pillory'd; per Allibon J. Cumb. 62. Mich. 3 Jac. 2. B. R. Anon.

13. Ld C. Parker said, that he did not think it would be perjury at law, if the *depositions of a witness taken de bene esse* were quite contradictory to his depositions in chief, there being no issue join'd, as there must be before the depositions are taken in chief. Wms's Rep. 569. Trin. 1710. in Case of Cann v. Cann.

14. It seems, that any false oath is punishable as perjury, which tends to mislead the Court in any of their proceedings relating to a matter judicially before them, tho' it no way affect the principal judgment which is to be given in the cause; as where a person offers himself to be bail for another, and knowingly and wilfully swears that *his substance is greater than it is*. Hawk. Pl. C. 173. cap. 69. s. 3.

15. Also it has been resolv'd, that not only such oaths as are taken

taken upon judicial proceedings, but also all such as any way tend to abuse the administration of justice, are properly perjuries; as where one takes a false oath before a Justice of the Peace, in order to induce him to compel another to find sureties for the peace &c. Or where a person forswears himself before commissioners appointed by the King to inquire of the forfeitures of his tenants estates &c. whereby he makes them liable to be seized by Exchequer process, Hawk. Pl. C. 173. cap. 69. s. 3.

[ 310 ] (B) Punishable, how. At Common Law, and by Statute.

Perjuri &c. 1. PERjury, before the Conquest, was punish'd sometimes by death, dispendant omnia, relegantur de patria, nisi cessent & profundius emendent. Brompton's Chronicon, 331. l. 12. sometimes by banishment, and sometimes by corporal punishment &c. some were punish'd by cutting out their tongues, as was wont to be of false witnesses: afterwards it came to be more mild, as forfeiture of all his moveables; and afterwards it came to fine and ransom, and never to bear testimony. 3 Inst. 163, 164. cap. 74.

§ 31. l. 12. leges Alfredi & Godfrini.—Deinceps non sint digni juramento, sed ordalio. Ibid. 326. l. 24. inter leges Edwardi — Nunquam juramento postea dignus sit nec in sanctificato atrio aliquo jaceat, si moriatur, si non habeat episcopi testimonium in cujus diocesi sit, quod penitentiam receperit, & presbiter hoc referat episcopo infra xxx noctes, utrum ad emendationem & satisfactionem venerit; si non faciat hoc, componat, sicut episcopus ei concedit. Ibid. 84. l. 60. inter leges Adelstani regis.—Manum perdat vel dimidiam veram, & hoc commune sit domino suo & episcopo. Et non habeatur deinceps juratione dignus, si erga Deum profundius non emendet, & plegios inveniat quod semper in reliquum cesset. Ibid. 926. l. 51. inter leges Kanuti regis.—And there immediately follows another law, viz. Si quis mendaci testimonio manifeste probatus inde fuerit, non admittatur deinceps in legitimum testimonium, sed solvat regi, vel domino suo \* HEALS-  
VANG ———\* This was a pecuniary mulct in lieu of standing in the pillory. Somn. Gloss. verbo Halsfagium.

F. was indicted on this statute in giving false evidence to the grand inquest at a sessions held at W. &c. upon an indictment of writ. This indictment

2. 5 Eliz. cap. 9. s. 3. enacts, That all persons which shall corruptly procure any witness by letters, rewards, promises, or other sinister means, to commit wilful and corrupt perjury, in any matter depending in suit by writ, action, bill, complaint, or information, concerning lands or hereditaments, goods, debts or damages in any of the Queen's Courts of Record, or in any Leet, ancient Domesne Court, Hundred Court, Court Baron, or in the Courts of the Stannary in Devon and Cornwall, or shall corruptly procure or suborn any witness sworn to testify in perpetuam rei memoriam, such offenders shall, being convicted, forfeit 40 l.

was removed into B. R. and F. discharged thereof; for this statute has two branches. The first is against procurers of perjury, and this is [in] matter depending in suit by bill, writ, action, or information; so that procurement of perjury upon indictment is out of this branch. The second branch, upon which F. was indicted, is provided against those who commit perjury by bis or their deposition in any of the Courts therein mentioned, or being examined in perpetuam rei memoriam. And tho' this clause be general, and not restrained to any particular suits, viz. by bill, writ, action, or information; as the first was, yet this shall be construed to refer to the first, and shall be expounded by it. And so one part of the act shall expound the other; for otherwise, the party that commits the perjury upon [the] indictment shall be punished by this last branch, and he who suborns and procures him to commit it, will pass unpunished. 5 Rep. 99. a. Mich. 40 & 41 Eliz. B. R. Flower's Case.—Ibid. says it was so adjudged, Mich. 36 & 37 Eliz. B. R. in Monday's Case.—And also, that such judgment was given, Trin. 39 Eliz. in B. R. in case of perjury supposed to be committed

mitted upon an indictment of felony.—Perjury and subornation of perjury upon an indictment for the King, as in the case above of a riot, is out of the words of the statute, as was resolved in *FLOWER'S CASE*; because perjury upon an indictment is not within the statute. But since perjury was an offence punishable by the common law, tho' the indictment of F. founded upon the statute was overthrown, yet his perjury, tho' upon an indictment, is punishable, and was most commonly punished in the Star-Chamber. 3 Inst. 164.—But where P. was indicted upon this statute, because he was produced as a witness for the King, upon a trial in an information, and sworn &c. shewing the oath and the falsity ther-in; an exception was taken, that a witness being produced and deposed for the King may not be punished by way of indictment, which is the suit of the King merely; for he cannot punish his own witness who swears for him; and it was said to be so resolved in the Star-Chamber, that a bill there lies not against him upon that statute; and of that opinion was the whole Court, that such a witness is not punishable by way of indictment; whereupon he was discharged. Cro. J. 120. Trin. 4 Jac. B. R. \* *Price's Case*.—It appears, that perjury committed in an information exhibited by the King's attorney, or any other for the King, by any witness produced on the behalf of the King, is punishable, either by this act, or by the common law; and so it was resolved in the Case of *Rowl. Ap. ELIZA*, which was this The King's attorney preferred an information in the Exchequer against Hugh Nanny, Esq; the father, and Hugh Nanny the son, and others, for intrusion, and cutting down a great number of trees &c. in Penrose in the county of Merioneth; the defendant pleaded Not guilty, and the trial being at the bar, Rowl. Ap. Eliza was a witness produced for the King; who deposed upon his oath to the jury, that Hugh the father and Hugh the son joined in sale of the said trees, and commanded the vendees to cut them down; upon which testimony the jury found for the King, and assessed great damages, and thereupon judgment and execution was had. Hugh Nanny the father exhibited his bill in the Star-Chamber at the common law, and charged Rowland Ap. Eliza with perjury, and assigned the perjury, in that he said Hugh the father never joined in sale, nor commanded the vendees to cut down the trees &c. And it was resolved, first, that perjury in a witness is punishable by the common law. Secondly, that perjury in a witness for the King was punishable by the common law, [ 311 ] either upon an indictment, or in an information, or by this act in an information. And the said Rowland Ap. Eliza was by the sentence of the Court convicted of wilful and corrupt perjury. 3 Inst. 164. cap. 74.

\* S. C. cited 1 Hawk. Pl. C. 179. cap. 69. f. 19. where the Serjeant says, It seems easy to account for the judgment, because he supposes it must be intended to have been a criminal information; but if the information, whereon the said perjury was supposed to have been committed, had been of a civil nature, he did not see any reason why it should not be as well within the meaning, as it seems to be expressly within the words of the statute; for surely the opinion, that the King cannot by indictment, which is his own proper suit, punish his own witness who swears for him, cannot be agreeable to law; because, however the perjury of such a witness may seem to tend to promote the King's interest in relation to the cause which happens to be in dispute; yet certainly it is a heinous crime in its own nature, and as much an abuse to justice, and of the same ill consequence to the publick, and consequently as worthy of the King's resentment, as if it had been taken against him.

† Cro. J. 212. Mich. 6 Jac. B. R. S. C. by the name of Nanuge v. Ap. Eliza & al.

This statute makes nothing perjury but what was so before; per Holt Ch. J. And per Eyre J. it pursues the common law, and adds nothing new but the penalty. Carth. 422. Mich. 9 W. 3. B. R. in Case of the King v. Greep.

S. 4. If such offender have not goods or lands to the value of 40*l*. he shall suffer imprisonment one half year, and stand upon the pillory one hour in some market town adjoining in open market there.

S. 5. No person so convicted shall be received as a witness in any Court of Record, until the judgment given against the said person be reversed; and upon every such reversal the parties grieved shall recover their damages against such as did procure the said judgment to be first given against them by action upon the case.

S. 6. If any person, either by subornation, unlawful procurement, or means of any other, or by their own act, wilfully and corruptly commit wilful perjury, in any of the Courts before mentioned, or being examined ad perpetuam rei memoriam, every person so offending, and being convicted, shall forfeit 20*l*. and have imprisonment six months, and the oath of such person shall not be received in any Court of Record, until the judgment be reversed by attainr or otherwise; and

So that the procurer is to forfeit more than the party perjured. Sav. 46. in pl. 98.—So that in the judgment of

parliament  
plus peccat  
author quam  
actor. 3  
Inst. 167.—

and upon such reversal the † parties grieved to recover their damages against such as did procure the judgment to be given against them by action upon the case.

A man cannot be guilty of subornation of perjury, unless perjury be actually committed; per Holt Ch. J. But he said, he had known one set in the pillory for \* endeavouring to suborn, it being a great offence. Comb. 450. Trin. 9 W. 3. B. R. Anon.

\* 2 Show. 1. Pasch. 30 Car. 2. B. R. The King v. Johnson.—Hawk. Pl. C. 177. cap. 69. f. 10. says, that in such case the party is liable to be punished, not only by fine, but also by infamous corporal punishment.

† He that brings an action upon this statute must be the party grieved; otherwise he cannot have it, but ought to have the offender punished in the Star-chamber. 3 Bulf. 147. in Case of Cockeril v. Aphorp.—Bill of debt was brought upon this statute, and held to be maintainable, and adjudged for the plaintiff. Cro. E. 434. Mich. 37 & 38 Eliz. B. R. Johnson v. Pays.

S. 7. If the offender have not goods to the value of 20 l. he shall be set on the pillory in some market-place by the sheriff if without any city or town corporate, and if within such city &c. by the head officer &c. and there have both his ears nailed, and be disabled for ever to be sworn in any of the Courts of Record aforesaid, until the judgment be reversed, and thereupon to recover his damages.

S. 8. The one moiety of which money forfeited to be to the Queen, and the other moiety to such person grieved by reason of the offence, that will sue for the same.

S. 9. As well the Judges of the said Courts where such perjury shall be committed, as also the Justices of assize and gaol delivery, and the Justices of peace at their quarter sessions, shall have power to inquire of all offences contrary to this act, by inquisition, presentment, bill or information, or otherwise lawfully to hear and determine the same.

S. 10. The Justices of assize shall in every county two times in the year in their sittings make proclamation of this statute.

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S. 11. This act shall not extend to any Ecclesiastical Court, but that such offenders may be punished by such laws as heretofore in the Ecclesiastical Courts.

A bill of perjury was su'd in the Chancery for perjury there committed contra formam of this statute. It was doubted, if defendant should plead Not guilty, whether he should be sworn to his plea, and also to answer to interrogatories as was used in the Star-Chamber. Resolved, that he should not be sworn or examined upon interrogatories, unless the Court of Chancery has absolute authority, and had used to examine perjuries in this Court before this statute; for then this is reserved by this proviso, as for the Star-Chamber; and if the Court of Chancery will examine perjury committed there (as it may by the statute), it must be by Latin bill, and the pleadings in Latin, and issue joined there, and so try it in B. R. as is usual in the like cases. D. 288. a. pl. 51. Pasch. 12 Eliz. Anon.—3 Inst. 167. cites S. C.

S. 13. This act shall not restrain the power of any Judge having absolute power to punish perjury before, but that they and every of them shall and may proceed in the punishment of all offences heretofore punishable, in such wise \* as they might have done and used to do before the making of this act, to all purposes, so that they set not upon the offenders less punishment than is ascertained in this act.

Made perpetual by 29 Eliz. cap. 5. and 21 Jac. 1. cap. 28.

Usage cannot give a Court authority, where it could not do it of right before, by reason of the words, as they might have done, and used to do before &c. D. 243. a. pl. 54. Mich. 7 & 8 Eliz. Onslow's Case.

3. If a witness deposes falsely, but the jury do not credit his oath, but give their verdict against his oath; tho' the party grieved cannot

not sue him for the perjury, yet he shall be punished at the suit of the King. Per Cur. 3 Le. 230. pl. 310. Mich. 31 Eliz. B. R. in Hamper's Case.

4. Quære, If upon aid praier, he in reversion joins, and he is grieved and prejudiced by an oath, and deposition, whether he may maintain an action upon this statute? For clearly, by the common law he may have attain. Yelv. 22. seems to be a quære of the Reporter at the end of the Case of Brode v. Owen.

Brownl. 82.  
83. S. P. at  
the end of  
the S. C.  
and seems  
a copy of  
Yelv. 22.

5. 2 Geo. 2. cap. 25. s. 2. The more effectually to deter persons from committing wilful and corrupt perjury, or subornation of perjury; it is enacted, that, besides the punishment already to be inflicted by law for so great crimes, it shall be lawful for the Court, or Judge, before whom any person shall be convicted of wilful and corrupt perjury, or subornation of perjury, to order such person to be sent to some house of correction within the same county for a term not exceeding seven years, there to be kept to hard labour during all that time; or otherwise to be transported to some of his Majesty's plantations beyond the seas for a term not exceeding seven years, as the Court shall think most proper; and thereupon judgment shall be given: that the person convicted shall be committed or transported accordingly, over and above such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported, shall voluntarily escape or break prison, or return from transportation before the expiration of the term for which he shall be ordered to be transported, such person being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be tried for such felony in the county where he escaped, or where he shall be apprehended.

S. 4. This act shall not extend to Scotland.

S. 5. No attainder for any offence hereby made felony, shall make or work any corruption of blood, loss of dower, or disherison of heirs.

S. 6. This act shall be of force for five years to be reckoned from the 29th of June 1729, and from thence to the end of the then next session of parliament.

Made perpetual by the 9 Geo. 2. cap. 18.

### (C) Punishable. In Respect of the Court or [ 313 ] Persons, before whom.

1. WHERE the Court hath no authority to hold plea of the cause, but it is coram non iudice, there perjury cannot be committed. 3 Inst. 166.

S. P. per  
Dolben J.  
2 Show. 31.  
in Case of  
Goodwin v. Brown.—Cited 1 Cro. 352.

2. Tho' perjury in the Spiritual Court is not punishable by the statute, yet the statute leaves it to be punished as it was before,

False oath  
in the Spirit-  
ual Court.  
fo

(tho' it be no Court of Record) is perjury, for which the party may be punished at the common law by indictment; per Cur. and therefore refused to quash an indictment of perjury for a false oath made there. Sid. 454. pl. 23. Pasch. 22 Car. 2. B. R. Anon.—1 Hawk. Pl. C. 173. cap. 69. f. 3.

so that it is punishable in the Star-Chamber. Cro. E. 185. Trin. 32 Eliz. B. R. Plaice v. How.

So perjury may be in the Star-Chamber. 3. Perjury may be in the Ecclesiastical Court; for it is a Court Judicial. Cro. E. 609. pl. 12. Pasch. 40 Eliz. B. R. Shaw v. Thompson.

Cro. E. 609. pl. 13. Pasch. 40 Eliz. Corbet v. Hill. — So before the Justices of assize. Ibid. pl. 14. Anon.

\* Hawk. Pl. C. 173. cap. 69. f. 3. cites S. C. but says, it seems certain, that no oath whatever in a mere private matter, however wilful and malicious it may be, is punishable as perjury in a criminal prosecution; for private injuries are to be redressed by private actions.

4. An indictment of perjury for swearing before a Justice of the peace, that J. S. was present at a conventicle, or a meeting for religious worship &c. it was moved to quash it, because it did not appear to be a conventicle, (viz.) that there was above the number of five, and so the Justices of peace had no power to take an oath concerning it, and then it could be no perjury; to which the Ld. Ch. J. said, that conventicles were unlawful by the common law, and the Justices may punish unlawful assemblies. And he seemed to be of opinion, that a man might be indicted of perjury for a voluntary and extra-judicial oath; and cited a late case, where one had *\* stolen away a man's daughter, and went before a Justice of the peace, and swore that he had the father's consent, and this in order to get a licence to marry her;* and he was indicted, and convicted thereupon. And all the Court said, that it was not the course to quash indictments of perjury, nuisance, or the like; but to put the party to plead them. Vent. 369, 370. Mich. 25 Car. 2. B. R. Anon.

\* S. P. For which the party may be punished at common law by indictment; per Cur. Sid. 454. in pl. 23. Pasch. 22 Car. 2. B. R. Anon.

5. The statute has subjected the offender to a certain penalty, and to a corporal punishment, and therefore the perjury must be by swearing falsely in a Court of Record, and in a thing material to the issue. But this is not required at common law; for it is perjury to swear falsely in a \* Court Baron, or in the Ecclesiastical Court, which are not Courts of Record; nor that it shall be in a thing material to the issue; for a man may be perjured in an answer in Chancery to a thing not charged in the bill. Per Cur. 5 Mod. 348. The King v. Greep.

—Perjury cannot be committed in the Court of the Lord of Copyholds, or in any Court which is holden by usurpation, otherwise in a Court-Leet, or Court-Baron which is held by title. Godb. 179. pl. 25. Mich. 9 Jac. C. B. Anon.

6. The oath ought to be taken before persons lawfully authorised to administer it; for if it be taken before persons acting merely in a private capacity, or before persons pretending to a legal authority of administering such oath, but having in truth no such authority, it is not punishable as perjury; yet a false oath taken before commissioners, whose commission at the time is in strictness determined by the demise of the King, is perjury, if taken

taken before such time, as the commissioners had notice of such demise; for it would be of the utmost ill consequence in such case to make their proceedings wholly void. Hawk. Pl. C. Abr. 203, 204. cap. 69. f. 4.

(D) Punishable. In respect of being committed  
in any Judicial Proceedings.

1. **T**H O' an oath be given by him that hath lawful authority, and the same is broken, yet if it be not in a judicial proceeding, it is not perjury punishable either by common law, or by 5 Eliz. because they are *general and extra-judicial*, but serve for aggravation of the offence, as general oaths given to officers or ministers of justice, citizens, burgesses, or the like, or for the breach of the oath of fealty or allegiance &c. they shall not be charged in any Court Judicial for the breach of them afterwards. As if an *officer commit extortion*, he is in truth perjured; because it is against his general oath; and when he is charged with extortion, the breach of his oath may serve for aggravation. 3 Inst. 166.

The oath must be either taken in a judicial proceeding, or in some other public proceeding of the like nature, wherein the King's honour and interest are concerned; as before commission-

ers appointed by the King, to inquire of the forfeiture of his tenants, or of defective titles wanting the supply of the King's patents. But it is *not material, whether* the Court, in which a false oath is taken, be a *Court of Record*, or not, or whether it be a *Court of Common Law*, or a *Court of Equity or Civil Law* &c. or whether the oath be taken in the face of the Court, or out of it before persons authorized to examine a matter depending in it, as before the sheriff on a writ of inquiry &c. or whether it be taken in relation to the merits of a cause, or in a collateral matter; as where one, who offers himself to be bail for another, swears that his substance is greater than it is &c. But neither a false oath in a mere private matter, as in making a bargain &c. nor the breach of a promissory oath, whether publick or private, are punishable as perjury. Hawk. Pl. C. Abr. 203. cap. 69. f. 3.

2. If the defendant perjureth himself in his *answer in \* Chancery, Exchequer-Chamber* &c. he is not punishable by 5 Eliz. for it extendeth but to witnesses; but he may be punished in the Star-Chamber &c. 3 Inst. 165.

\* S. P. per Tanfield. 2 Le. 201. pl. 123. in Matthew's Case.

3. A bill of perjury tam quam was sued, because the *defendant being one of the \* homage &c. did present* with the rest of the homagers, *that the plaintiff had cut down certain trees*, whereas in truth he had not cut down any. All the Justices held, that for this matter the bill lay not upon the statute 5 Eliz. for this branch of the statute is to be *intended of perjury in depositions only*. 3 Le. 201. pl. 253. Pasch. 30 Eliz. B. R. Matthews's Case.

\* S. P. 1 Hawk. Pl. C. 80. cap. 1. 20.— If a man be forsworn in a Court Baron before the Seward, this is perjury; per

Hobart Ch. J. to which Hatton J. agreed. Win. 3. Pasch. 10 Jac. in Case of the King v. Bowen. — S. P. by Twidlen J. Mod. 15. pl. 101. Hill 21 & 22 Car. 2. B. R. Aron.—Perjury at common law may be in a Court which is not of Record, as *Chancery or Court Baron if in a material point*, and so upon the statute by express words. Freem. Rep. 506. Pasch. 1693. The King v. .... one of the Ld Mountague's witnesses.—And an indictment for perjury in the like case was discharged, because the statute *ex extend only to perjurers of witnesses in their examinations &c.* per Wray and other Justices. D. 288. a. marg. pl. 51. cites Trin. 19 Eliz. B. R. Knight's Case.—But see Cro. E. 907. contra. Mich. 44 & 45 Eliz. Poulney v. Wilkinson.

4. One was indicted for perjury committed in his answer in the Star-Chamber, and upon his examination to interrogatories there. But because these matters are not within the statute, he not being examined as a witness between the parties, nor in perpetuum rei memoriam, he was discharged. Cro. E. 148. Mich. 31 & 32 Eliz. B. R. Rither's Case.

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And it was also agreed, that the perjury at the inquest of office is assignable as a misdemeanor, but not upon the statute of 5 Eliz. and the Court took the antedating to be a great offence, but because it was not in the bill complained of, they did not proceed. Mo. 627. Agar's Case.—\* S. P. 1 Hawk. Pl. C. 180. cap. 69. f. 20.

5. Information was brought that where A. was receiver of the rents of the Queen, and had received them, and had given acquittance within forty days after the time of payment, he had depos'd at an inquest of office by commission to inquire whether the condition was broken for nonpayment within the forty days, that he in fact received it after the forty days expired, and antedated his acquittance within the forty days. It was rul'd that the attorney may have information upon perjury suppos'd in advantage of the Queen, and that any other person may assign such perjury, if he be griev'd by it, but the attorney may, tho' the Queen be benefited by it. Mo. 627. pl. 861. Mich. 43 & 44 Eliz. Agar's Case.

Brownl. 82. 83. S. C. and seems only a copy of Yelv. 22. —Hawk. Pl. C. 181. 182. cap. 69. f. 12. cites S. C. But the Sergeant says, Perhaps the authority of this opinion may justly be questioned, not only because the words of the statute whereon it is grounded are mistaken, but also because the offence seems in truth to be both within the meaning and letter of the law. since thereby a person is griev'd in respect of a cause depending in suit in a Court mentioned in the statute.

6. A. brought a bill in Chancery against B. and afterwards C. was made party to the bill against B. by order of the Court. A commission issued between C. and B. to examine witnesses. Upon this commission J. S. was examined ex parte C. and depos'd directly for C. against B. And thereupon a decree was made against B. B. brought debt upon the statute against J. S. as a party griev'd by the deposition: J. S. demurr'd. Gawdy and Yelverton J. held that the action did not lie; for the words of the statute are, where a man is griev'd by a deposition in a suit between party and party; and in this case it appears that C. was not party to the suit, but came in a latere by an order, and no bill depending either against him or brought by him, and so it is out of the statute; for being a penal law, it shall be taken strictly. Yelv. 22 Mich. 44 & 45 Eliz. B. R. Brodee v. Owen.

S. P. But if he had been examined on the part of the King upon interrogatories, it is otherwise. Per Weston. Dal. 84. 85. pl. 39. 14. Eliz. Anon.

7. M. was defendant in a bill in the Star-Chamber, and examined upon interrogatories. The plaintiff, supposing that he had committed perjury in his examination, procured him to be indicted upon the statute. But per tot. Cur. he cannot; for he was no witness, but remained still defendant, notwithstanding his being examined upon interrogatories; for if he confessed any thing against himself upon the interrogatories, he should be condemned. Quod nota. Yelv. 120. Hill. 5 Jac. B. R. Sir Robert Miller's Case.

(E) Punishable. In Respect of its being in a *Thing material or not to the Issue.*

1. **I** T is not a perjury within the statute 5 Eliz. unless it be depos'd upon some matter depending in suit in some Court of Record; and if he be perjurd in circumstance, and \* not in the point in question, it is not material or punishable by this statute. As if a man swears, that he saw J. S. steal and deliver such a deed, and when he did it, he was in a † blue coat; where indeed he was not in a blue coat. Per Popham. Goldsb. 191. pl. 140. Hill. 43 Eliz. Anon.

S. P. Or in other Courts mentioned in the statute. And other circumstances must be pursued, according to the description of it

in the statute. Freem. L. 506. Pasch. 1693. The King v. .... one of the Lord Mountague's witnesses.

If it be not material to the issue or cause in question, it is not perjury, tho' it be false, because it concerns not the point in suit; and therefore in effect it is extrajudicial. Besides this a † gives remedy to the party griev'd, and if the deposition be not material, he cannot be grieved thereby. 2 Inst. 176.

\* Where it is not material to the issue, it is not punishable by the statute. Resolv'd 11 Rep. 13. a. Mich. 10 Jac. in Case of Priddle v. Napper. — S. P. by Roll Ch. J. [ 316 ] Sty. 337. Trin. 1652. in Case of Cuitodes v. Howel Gwin. — S. P. agreed by the Attorney General. Arg. 2 Show. 20. in Case of The King v. EMERTON, that it must be so upon the statute; but at the common law it is not necessary.

† Salk. 514. Mich. 9. of W. 3. B. R. Holt Ch. J. in the Case of the King v. GREENE, denied this Case of Goldsb. 191. and held that if a man gives evidence to the credit of a witness, tho' this be not the issue, yet it is perjury.

‡ If a man be indicted for perjury at common law, it must be for a thing that is not altogether foreign, but must have some relation to the matter; as if a witness should swear what clearest he had on when he saw such a fact done, it is altogether foreign to the matter in question, and if he were mistaken, it is not perjury at common law. Freem. L. 506. Pasch. 1693. The King v. .... one of the Lord Mountague's witnesses.

2. A. was examined upon interrogatories in Chancery, whether J. S. was of *sana memoria* at the time of his death; to which he answer'd, that he was of *non sana memoria* five days before his death. Upon which answer J. S. was indicted of perjury; but upon exception the indictment was quash'd; because it was in a thing immaterial; for it might be that he was not of found memory five days before his death, and yet be of found memory at the time of his death. Arg. Palm. 383. cites 14 Jac. Manton's Case.

S. C. cited Arg. 2. Roll R. 369.

3. Indictment for perjury, setting forth, that one Sotherton had brought an action of trespass against T. S. for a trespass done by his sheep in Sotherton's Close (reciting the whole record) and that T. S. had pleaded Not guilty, and at the trial G. D. (the person now indicted) *falso malitiose & corruptive* gave evidence to the jury thus, (viz.) I saw thirty or forty of T. S.'s sheep in Mr. Sotherton's Close, and I knew them to be his sheep, because they were marked with a (5) on the shoulder, and all his sheep are mark'd with a (5); when in truth his sheep were not mark'd with a (5). It was objected to this indictment, that the perjury was assigned in a thing immaterial to the issue; for that was whether the sheep

Palm. 382. 383. Trin. 12 Jac. B. R. S. C. and Houghton J. said \* that if G. D. had sworn that he saw the sheep there, and that J. S. also saw them, perjury may be

assign'd in this; and yet it is not material whether J. S. saw them or no. And so he held in this principal case also. And Lea Ch. J. held the perjury well assign'd, and that the reason was not immaterial, and concluded that this shall not be punishable. [But nothing is said of any judgment.] And *ibid.* 538. Pasch. 4 Car. B. R. this was mov'd, and it was insisted that it was not perjury within the statute; because the mark was not material, but that the material point was, whether they were the sheep of T. S. or not. But that Hyde Ch. J. and Whitlock held e contra, and that it is perjury; for tho' it be not the principal point in issue, yet it conduces to it, and is the thing which led the jury. But Doderidge contra, because the swearing was only to the particularity, and here is no perjury; for it is a thing which *dubiously concludes to the issue*, because another man may mark his sheep with a (s) as well as T. S. But this indictment being against two, viz. JARY AND KING, Hyde Ch. J. said that the indictment was vitious; for two cannot be indicted together, and the perjury of the one is not the perjury of the other; to which Whitlock accorded, but Doderidge said nothing. And day was given to the Attorney General to maintain the indictment. — 2 Roll R. 368. 369. Mich. 21 Jac. B. R. S. C. of indictment against one defendant, and there it is that \* Haughton J. said that if he had sworn that he saw the sheep there, and that J. S. also saw them, perjury might be assign'd in it; but here the thing is not material, in which the perjury is assign'd, and therefore &c. — *Ibid.* Ley Ch. J. held the matter of the mark to be the inducement to the jury to find the verdict, and that thence arose the prejudice to the party; and therefore it seemed to him that the perjury could not be better assign'd, and that this being a prejudice to the party, it is not reasonable that he shall be unpunish'd. — [But in neither of the reports is the case mentioned to be adjudg'd.]

4. One was charg'd with perjury, for having sworn that *J. S. drew his dagger, and beat and wounded W. R. and it was found to be with a staff.* This was agreed not to be perjury; for the *beating was the only thing material.* Cited by Richardson. Het. 97. Pasch. 4 Car. C. B. in the Case of Allen v. Westley, as one Styles's Case.

[ 317 ] 5. An indictment was, that he being interrogated by the Judge in giving evidence to the inquest, viz. whether A. brought such a number of sheep from D. to S. all together? he answered Yes, where in truth he brought part at one time and part at another. The Court discharg'd him; for the bringing them all at one or at several times is not material; but the bringing them or not is the substance; and the *manner of bringing is circumstance only.* 2 Roll. R. 41. Trin. 17. Car. Laiston's Case.

6. A witness was ask'd, whether such a *sum of money was paid for two things then in dispute?* to which he answered Yes, tho' in truth it was paid but for one by agreement; yet it not being material whether it was paid for one or for both, it was resolved that he ought not to be punished for perjury. Cited by Haughton J. 2 Roll. R. 42. in Laiston's Case.

Serjeant Hawkins says, Perhaps in all these cases [viz. pl. 2. 3. 4. 5.] it ought to be intended, that the question was put in such a manner, that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him through inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly concerning the circumstances, and he gave a par-

a particular and distinct account of the circumstances, which afterwards appear to be false, surely he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. And upon these grounds the Serjeant cannot but think the opinion of those Judges in the above Case of *JARY v. KING*, who held him guilty of perjury, very reasonable; for the giving such a special reason for his remembrance could not but make his testimony more credible than it would have been without it; and tho' it signified nothing to the merits of the cause whether the sheep had any mark at all or not, yet inasmuch as the assigning such a circumstance in a thing material had such a direct tendency to corroborate the evidence concerning what was most material, and consequently was equally prejudicial to the party, and equally criminal in its own nature, and equally tending to abuse the administration of justice, as if the matter sworn had been the very point in issue, there doth not seem to be any reason why it should not be equally punishable. But the Serjeant says he cannot find this matter any where thoroughly settled or debated, and therefore shall leave it to every man's own judgment, which, from the consideration of the circumstances of each particular case, may generally, without any great difficulty, discern whether the matter in which perjury is assigned, were wholly impertinent, idle and insignificant, or not, which seems to be the best rule for determining whether it be punishable as perjury or not. *Hawk. Pl. C. 175. 176. cap. 69. s. 8.*

7. A. devised his estate to M. his wife, and her heirs, and died. J. S. being of the name of A. set up a deed, and had two trials at bar, but was nonsuited in both; and upon the evidence it was very suspicious that the deed was forg'd. M. exhibited a bill in Chancery to discover what he knew of the devise, and whether he did not solicit to prove this will in Chancery; to which he answered, that he did not solicit in Chancery to prove the will of his kinsman A. the testator. And for this answer J. S. was indicted at common law, and it was prov'd at the trial, that he did solicit, but that he did not pay the fees: the Jury found him guilty, and it was mov'd to stay judgment, that it is not perjury, because it is not material. But per Cur. † *Perjury at common law may be in a thing not material.* Sid. 274. pl. 32. Trin. 17 Car. 2. B. R. the King v. Drue.

And therefore if one gives a false answer to a thing not charg'd in a bill, this is perjury punishable at common law; but if in answer to interrogatories one be sworn in a thing not material charg'd in the interrogatories,

this is not perjury, nor is it a matter punishable by the common law, because he that administers the oath hath no power to administer it, unless in a matter charg'd in the interrogatories. Per Cur. *Ibid.*—\* [The words in the book are as here, but quære if they should not be thus, viz. In a thing material not charg'd in the interrogatories.]

† Serjeant Hawkins, citing S. C. says, Surely this ought not to be understood in so great a latitude as if it were meant that every falsity in such an answer must needs be perjury, howsoever foreign, circumstantial and trivial the point wherein it is assigned may be, which is directly contrary to what seems to be clearly taken for granted in other books. And therefore perhaps no more may be meant by it, but that he may be as well guilty thereof by answering to a matter not charged in the bill, as by answering to the matters therein contained, which may alone be said to be material, because the defendant is not obliged in his answer to take notice of any thing else; or else perhaps the meaning may be, that in a prosecution for perjury at common law setting forth a false oath in such an answer, relating to the thing said to be in variance, the falsity shall be intended prima facie to have been some way material in the cause, unless the contrary be proved by the other side. 1 *Hawk. Pl. C. 176. cap. 69. s. 8.*

8. Upon a question about sealing a deed at D. and whether J. S. was witness to it, G. swore that J. S. at the time was 100 miles distant from D. viz. at N. and so could not witness it. Justice Eyre held, that if a man swears falsely in a matter which is not material to the issue, 'tis not perjury; and to prove the matter, he cited the Cases in the \* margin; and moreover, that the statute 5 Eliz. against perjury pursues the common law, and adds nothing new but the penalty; and that in this case the matter in which the perjury was assigned, was immaterial to the issue,

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\* 3 Inst.  
164. 2  
Bull. 150.  
Hob. 53.  
11 Rep.  
1. 3. 1 Cro.  
330. 12 Mod.

135. 2 Roll Rep. 41.  
 369. Yelv. 111. Sty.  
 136. —  
 † Het. 97.  
 Cro. 352.  
 —Parker Ch. J. said his opinion was, that perjury may be committed in a circumstantial matter, tho' he said he did not remember that in fact it was ever carried so far; that he had heard of a case in King William's time, [which seems to be this Case of the King v. Greep.] and that upon this oath the defendant was convicted of perjury. And observed, that tho' the matter of this oath was but a circumstance consider'd in relation to the point in question upon the trial in which the oath was given, yet it was *all his oath, his intire evidence*. But he said that if perjury might be committed in a matter of circumstance, it must be a material circumstance, and of that weight, *that without it he could not hope to find credit with the jury*. 10 Mod. 195. Mich. 12 Ann. B. R. in the Case of the Queen v. Muscot.

S. P. But that a witness coming to town lay at one inn, when he lay at another inn is not perjury, because 'tis immaterial. Per Holt. Comb. 461. S. C.—2 Salk. 514. S. C.—12 Mod. 142. S. C.

### (F) Punishable. In respect of its being a *Mistake, or Inadvertency*.

1. **L.** WAS indicted, and the perjury prov'd was, *that L. swore at a trial by Nisi Prius, that J. S. was in London to be arrested* (which was material, as the issue was concerning the taking of J. S. by the sheriff), *where J. S. was not in London*. And upon the evidence of the perjury it was prov'd that *J. S. was in Southwark* out of the liberties at the same time, (which according to the general acceptation is London, but not where the Sheriff of London has any thing to do); and the Jury found him guilty. The Court fin'd him only 20 l. because it seem'd to be sworn by *inadvertency*. Sid. 405. Hill. 20 & 21 Car. 2. B. R. The King v. Lewen.

2. Information of perjury; the case appear'd to be, that the defendant *S. went with the Justices, constables and others, to disturb a conventicle* in a town in Leicestershire, and that he *ask'd a fellow there his name, and he said James* (who was a known conventicler), whereas in truth the man named *was not there*, and the fellow that answered knew it, but the defendant did not; but however, believing it, he *swears* before the Justice that *James was at the conventicle*; and thereupon a conviction was had. And now upon motion, it being a plain mistake, the verdict was set aside, the oath not being wilful and corrupt perjury. 2 Show. 165. Mich. 33 Car. 2. B. R. The King v. Smith.

3. So a person swore, *that he saw and read such a deed, and it prov'd upon the trial to be only the counterpart which he saw; yet it*

it was held no perjury, because only a mistake. Cited by Parker Ch. J. and said he remembered this case rul'd by his predecessor. 10 Mod. 195. Mich. 12 Ann. B. R. in Case of the Queen v. Muscot.

(C) Punishable. By whom.

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1. A Perjury was voluntarily committed in B. R. by J. S. on proof of a suggestion for a prohibition granted there against an Ecclesiastical Judge according to the 2 & 3 E. 6. cap. 13. by which the party was staid of a consultation. It was a very great question, whether it was punishable in the Star-Chamber or not? and thereupon all the Justices assembled at Serjeant's-Inn, and they thought that it was not. D. 242. b. 243. pl. 53. Mich. 7 & 8 Eliz. Onslow's Case.

For perjury concerning any temporal act the Ecclesiastical Court hath no jurisdiction; and if it be concerning a spiritual matter, the

party griev'd may sue for the same in the Star-Chamber, and cites the statutes of 3 H. 7. cap. 1. & 11 H. 7. cap. 25. 32 H. 8. cap. 9. and then cites this Case in D. 242, 243. and says, When you have read this Case, you will confess how necessary the reading of ancient authors and records is; and the continual experience in the Star-Chamber is against the opinion conceived there. 3 Inst. 164.

2. A. brought a bill in Chancery against W. R. and W. S. — W. R. put in his answer, and also made affidavit that W. S. was so sick that he could not travel without danger of death. At the hearing the cause W. S. came into Court, and affirm'd he was not sick, but that W. R. had persuaded him to go to bed and feign himself sick, that on W. R.'s coming to London he might affirm he left W. S. sick a-bed. Ld. Egerton ordered them both to be examined upon interrogatories; and though W. R. denied, and W. S. affirm'd it, yet the practice appearing by other witnesses, which was not only a contempt to the Court, but likewise a double perjury in W. R. the Court adjudg'd him to pay 20 l. fine, to be imprison'd, and pay 10 l. costs. Mo. 656. pl. 900. 11 November. 44 Eliz. Bullen v. Bullen and Clerke.

And because it was doubted if perjury was punishable in Chancery, Lord Keeper Egerton shew'd a precedent 17 Feb. 37 H. 8. in a cause of BASKERVILL v. GULLIAM, where a witness who

had committed perjury in Chancery, was adjudged there to the pillory and to pay costs. Mo. 657. in S. C. — And the like 30 Eliz. in Case of POMEROY v. FORD, one Joyce a witness in the cause was adjudged to the pillory for perjury. And his Lordship said, that every Court may punish perjury appearing before themselves. Ibid.

A juror upon a *voire dire* affirm'd that he had not 40 s. freehold; and others of his neighbours affirm'd upon their oath, that they knew his land, and that it was of the annual value of 4 l. Whereupon the Justices had committed the juror to the Fleet. Ibid. cited by Ld. Egerton, as 30 Eliz. C. B. Sir Geo. Calveley v. Rishley.

Vaughan Ch. J. said, that perhaps a witness may be punished for perjury *in facie Curie*, but that he would not maintain it to be law. Vaugh. 152. in Bushell's Case. — Any Court may punish such a criminal for perjury committed in facie Curie, which was the better opinion in BUSHELL'S CASE, tho' the Chief Justice Vaughan doubted of it. 8 Mod. 179, 180. Trin. 6 Geo. 1. 1724. The King v. Thorogood. — The statute of 5 Eliz. of perjury directeth how perjury shall be punished saving the authority of the Star Chamber, yet for perjury committed in Chancery either in an affidavit or an answer &c. if such perjury appear to the Chancellor, the party may be punished according to his direction. 1 Chan. Rep. 14. Mich. 13 Jac. in the Earl of Oxford's Case.

3. Exception was to an indictment of perjury, that Justices of the Peace have no power by their commission to take indictments

No indictment lies before Justices of

*of peace for perjury at the common law; for their power* of perjury; but the Court doubted, and seemed afterwards of opinion, that they might. 11 Mod. 67. Mich. 4 Ann. B. R. in Case of the Queen v. Gunn.

is created by act of parliament within time of memory, and they have thereby no other authority than what is thereby given them; and the general words of their commission, *De omnibus aliis transgressionibus & malefactis quibuscunque*, must be understood of such crimes as they have power over, by the several statutes which created or enlarged their power. But *perjury upon the 5 Eliz.* is indictable before the Justices of Sessions; because it is so appointed by the particular provision of that statute; per Curiam. 1 Salk. 406. pl. 2. Mich. 9 Annæ B. R. in Case of the Queen v. Yarrington.

Serjeant Hawkins says, It has been of late settled, that *Justices of peace have no jurisdiction over perjury at common law*, and so as to forgery; the principal reason of which resolution he says he apprehends was, that inasmuch as the chief end of the institution of the office of these Justices was for the preservation of the peace against personal wrongs and open violence, and the word *trespass* in its more proper and natural sense is taken for such kind of injuries, it shall be understood in that sense only, in the said statute [of 34 E. 3. cap. 1.] and commission, or at the most to extend to such [ 320 ] other offences only as have a direct and immediate tendency to cause such breaches of the peace as libels &c. which on this account have been adjudged indictable before Justice of the peace. 2 Hawk. Pl. C. 40. cap. 8. f. 38.

4. One made an affidavit in C. B. and being afterwards examined, confessed it to be false, whereupon the C. B. recorded his confession, and ordered him to be put in the pillory. It was objected, that C. B. had no jurisdiction in criminal cases, and that therefore if it had appeared on record that the defendant was perjur'd, that Court could not have punished him; but it was answered, that the punishment by pillory is by the statute of 5 Eliz. And C. B. having given a sentence accordingly shews that they proceeded on that statute, which gives power to any Court where the perjury is committed to punish the offender; so that it is plain that that Court has a jurisdiction, especially since it is provided by that very statute, that it *shall not extend to any Ecclesiastical Court*, which being a negative pregnant, is a full proof that all other the King's Courts may punish such offenders, and even those who shall be convicted by their own confession; for the statute gives power to hear and determine by inquisition, information, bill, presentment, or otherwise, and to give judgment and award execution &c. Now by the word (*otherwise*) the confession of the party may be intended; besides, if C. B. cannot punish the defendant by the statute of 5 Eliz. he might be punish'd at common law; for perjury is an offence at common law. On the last day of the term the defendant was pillory'd. 8 Mod. 179, 180. Trin. 9 Geo. 1. 1724. The King v. Thorogood.

See 5 Eliz. cap. 6. f. 7. at (B).

### (H) Disability and Restitution.

2 Hawk. Pl. C. 417. cap. 43. f. 25. S. P. nor is such exception solv'd by a \* pardon; but it seems that the record of the conviction must be produced if it be a record of another Court; or the term &c. be shewn, if it be a record of the same Court.— Ibid. 395. cap. 37. f. 52. the Serjeant says, he does not find it clearly settled, whether the pardon of a conviction of perjury makes the party a good witness.

2. *Read was convicted of perjury by Dawson*; afterwards *R. convicted D. in the point of the first perjury*. It was *mov'd* for *R.* 1st. *that he having absented himself and judgment not being given, an entry might be made upon the record, that he be acquitted of the first perjury*; but the Court held, that they could not do it, but *he might bring error if he will*; but they restor'd him to his place of one of the attornies of the Court. 2dly, It was *mov'd, that R.'s bail be discharged notwithstanding his recognizance forfeited*, for the reasons before; but the Court said, they could not do it now in *another term* without danger of erecting a clock-house, besides the recognizance is estreated into the Exchequer. Sid. 217. pl. 23. Trin. 16 Car. 2. B. R. the King v. Read.

Plaintiff recovers against the defendant upon the sole evidence of J. S. and has judgment, and afterwards J. S. was convicted of perjury, upon the same evidence, notwithstanding the Court

would not set aside the judgment. But if it had been after verdict that an indictment of perjury was depending against J. S. the Court would have stopped entering the judgment till the perjury tried. Trials per Pais. 226, 227. cap. 11.

3. If a man is *convicted on the statute*, disability is part of the judgment, but *at common law it is only the consequence*. 2 Salk. 514. Mich. 9 W. 3. B. R. The King v. Greep.

4. A motion was made to *set aside a judgment for irregularity on the defendant's affidavit*; and it was *objected to the reading it, because he was convicted of perjury*; et per Holt Ch. J. Must he therefore suffer all injuries, and have no way to help himself? Powel J. You ought to have the record of conviction in your hand when you make this objection; but per Holt Ch. J. If he had, it would be nothing to the purpose. 2 Salk. 461. Mich. 4 Ann. B. R. Anon.

s Hawk. Pl. C. 433. cap. 46. f. 23. says, It has been rul'd, [ 321 ] that a conviction of perjury does not disable a man from making an affidavit in relation to the irregularity of a judgment.

making an affidavit in relation to the irregularity of a judgment.

## (I) Actions and Pleadings.

1. *AN action upon the statute of 5 Eliz. of perjury was brought by three, and they declared, that the defendant being examined upon his oath before commissioners, if a surrender was made at such a Court of such a manor of a copyhold, to the use of A. and B. two of the defendants swore, that no such surrender was made &c.* Exception was taken to the declaration, because the *certainty of the copyhold did not appear upon the declaration*; for the statute is, that in that case the party griev'd shall have remedy; so as it ought to appear in what thing he is griev'd; quod fuit concessum per totam Curiam. 3 Le. 68. Mich. 20 Eliz. Anon.

S. P. Hawk. Pl. C. 181. cap. 69. f. 22.

2. *Another exception was taken, because the action in such case is given to the party griev'd; and it appears upon the declaration, that the surrender, in the negative deposing whereof the perjury is assigned, was made to the use of two of the plaintiffs only, and then the third person is not a party griev'd, for he claims nothing by the surrender; and therefore, and because the two parties griev'd have joined with the third person not griev'd, it was the opinion*

opinion of Wray and Southcote Justices, that the writ should abate. Ibid.

S. P. Tho' 3. An information upon the statute 5 Eliz. was, that the defendant *commisit voluntarium perjurium contra formam statuti*, but did not say, *corrupte & voluntarie commisit perjurium*; it is not good. Per Shute J. Sav. 43. Mich. 24 & 25 Eliz. in the Exchequer, in the Case of Bradshaw v. Lowe & al.

*deposuit*; but because it was not alleged at the first when the fact was alleged, the declaration was adjudged insufficient, and that the plaintiff nihil cap. per billam. Cro. E. 201. pl. 30. Mich. 32 & 33 Eliz. B. R. Somerland's Case.—S. P. 1 Hawk. Pl. C. 178. cap. 69. f. 17.—The word *voluntarie* ought to be in the premises, and *corruptive* does not include it, and so was the opinion of the whole Court; and awarded that nil capiat per breve. Het. 12. Pasch. 3 Car. C. B. Kitton v. Walters.

\* The indictment wanted the conclusion, viz. *et sic falso & voluntarie perjurium commisit &c.* and defendant was discharged. Cro. E. 137. Trin. 31 Eliz. 9. Thomas's Case.

4 Le. 105.  
Mich. 29  
Eliz. B. R.  
S. C.

4. A man was indicted upon the statute of 5 Eliz. of perjury, in a Court Leet, and the indictment was, that he at the Court Leet of the Earl of Bath, *super sacramentum suum coram senescallo &c.* And exception was taken, because it said, *at the Leet of the Earl of Bath*, whereas every Leet is the King's Court, although another has the profit and commodity of it; and it was said, that the Steward of a Leet was an officer of record; and also his oath was, if he had made any rescous or not, with which he was charged. Drew, It is not within the statute of 5 Eliz. for then it ought to be before a jury in giving evidence, or upon some articles; but the Court was clear of opinion against him. Godb. 71. Mich. 28 & 29 Eliz. B. R. Anon.

5. In an action the plaintiff declared of a perjury in an action of debt brought, Hill. 27 Eliz. whereas the action in which the perjury was, was Hill. 28 Eliz. and so the recital did miss the record. It was objected, that by this means the party might be doubly charged; to which it was answered of the other side, that he cannot be doubly charged, because it is betwixt the same parties and in the same cause, and only a circumstance is mistaken. Per Clench J. It is needless to shew in what action the first perjury was committed; for if he says in trespass, whereas in truth it was in debt, all is naught; but per Gawdy J. if no action be alleged he cannot sue upon the statute of 5 Eliz. But the case was upon a special verdict, which found that the action was brought at another time than either of the parties had alleged, and no mention was of it before the verdict found it; and therefore Coke said it was void; for he said, that by 22 Ass. 17. the Jury cannot find any other thing than the parties have alleged; for there the jury found a dying seised after a recovery, whereas a dying seised was alleged, and did not say after a recovery. Godb. 88. pl. 98. Mich. 28 & 29 Eliz. B. R. Dennie v. Turner.

S. P. 1  
Hawk. Pl.  
C. 178. cap.  
69. f. 17.

6. When such heinous crime is objected against a person it ought to be fully alleged, or otherwise it is not good; as where the indictment was, that *Tacito per se sacro evangelio falso deposuit*, but it was not directly alleged that he was sworn; the indictment was dis-

discharged. Cro. E. 105. pl. 17. Trin. 30 Eliz. B. R. Dinflow's Case.

7. Indictment was, that the defendant was examined upon certain articles in the Star-Chamber, and that *falso & voluntarie deposuit*, but *shews not in what matter he swore falsely, nor in what action*; and the *oath was in the Star-Chamber in Middlesex*, and the *indictment in Stafford*; and he was discharg'd. Cro. E. 137. Trin. 31 Eliz. B. R. Stedman's Case.

8. Indictment was, that *defendant upon an issue in such a matter falso deposuit* such a thing, but *shewed not how the issue was, nor how the deposition trench'd to the point of the issue*; and he was discharged. Cro. E. 148. Mich. 31 & 32 Eliz. Lane's Case.

9. Indictment recited the statute, that if any be sworn &c. in any Court of Record, whereas the statute mentions them specially &c. The defendant was discharged. Cro. E. 137. Trin. 31 Eliz. Thomas's Case.

10. The indictment was, that *Apud castrum Lincoln falso deposuit*, and did not shew in what county the cattle was. The defendant was discharg'd. Cro. E. 137. Thomas's Case.

One was indicted by the name of N. L. of the parish of

*Algate*, but the indictment did not shew in what county *Algate* was, and thereupon was outlaw'd. The outlawry was reversed, tho' it was objected to be well enough, because *Middlesex* was in the margin, and so the parish should be intended to refer thereto. But, because an indictment shall not be taken by intendment, and because the county in the margin shall be refer'd to the place where the offence was committed, and not to the habitation of the party, therefore it was held to be ill and reversed. Cro. J. 167. Trin. 5 Jac. B. R. Leeche's Case.

Arrest of judgment in an indictment of perjury before the Justices of peace in Norfolk, for that it set forth, that a fine was levied in C. B. in Westminster in the county of Middlesex; and that the defendant perjured himself at Thed in the county aforesaid, which Mr. Serjeant Weld held, must relate to the last county named; and then the Justices of peace for Norfolk could not have jurisdiction; and this he said was the express case of the QUEEN v. RHODES, adjudged about 2 years ago in this Court. Sir James Mountague contra, and said, If it had been in case of an action, it would have been good; he took a difference between the county's being in the margin, and in the body of the indictment, and where it is only by way of recital and in the substantial part of the indictment; Weld said, and if it can ever be construed bad, it shall never be taken otherwise in an indictment: the opinion of the Court was, that the indictment was naught; sed adjournatur. 11 Mod. 66, 67, Mich. 4 Ann. The Queen v. Gun.

11. Exception was taken to an indictment of perjury upon the statute 5 Eliz. against three, because it was *falso & corruptive deposuerunt*, but not saying *voluntarie*; and that though at the end of the indictment it is *et sic voluntarium commiserunt perjurium*, yet this does not help it; and for this cause they were discharged. Cro. E. 147. Mich. 31 & 32 Eliz. B. R. Lembro v. Hamper.

Such count was held insufficient for two causes.

1. For that in the act of 5 Eliz. as here it appeareth, there are

two distinct clauses, one if he be perjured of his own proper act, the other if he be perjured by subornation &c. and the plaintiff ought to declare in certainty, within which of them the defendant is perjured. The 2d cause was, where the act says (wilfully and corruptly commit any wilful perjury &c.); and the words of the count are, falso dixit & deposuit, and says not voluntarie & corrupte; and the said clause (& sic commisit voluntarium & corruptum perjurium,) salveth not the former insufficiency, because it is but a conclusion upon the former matter. And the like judgment was given in this Court as to this latter point, anno 27 Eliz. in the Case of one MILLERS of Lincolnshire. 3 Inst. 167.

3 Le. 230. S. C. & 2 Le. 217. S. C. but in both places the word (*deceptive*) is instead of (*corruptive*) as here; and contra formam statuti does not help it — Indictment for perjury before a commissioner for taking affidavits concluded contra formam statuti, but does not say voluntarie, and therefore ill. Show. 190. Hill. 2 W. & M. The King v. Taylor.

12. One

S. C. cited by Holt Ch. J. who says, it is the Case of *KING* and *BOWLES*, and that he had examined the roll, and found it to be according to the report. 12 Mo. 141. Mich. 9 W. 3. in Case of the King v. Griebel. — S. P. Hawk. Pl. C. 183. cap. 69. l. 22.

12. One was indicted upon the statute of 5 Eliz. of perjury, for that there was a *suit in Chancery* betwixt one *MARSHALL* AND *HARVEY* for the manor of *Staverton* in the county of *Devon*, and a *commission* was thereupon awarded to examine witnesses; that the defendant swore that the deed of the feoffment of the manor (manerium prædictum innuendo) was delivered as an *escrow* to be delivered &c. *ubi revera* it was delivered absolutely &c. The first exception was, that this oath, that the deed of the manor was delivered as an *escrow* &c. is not material, unless it be shewn that it concerned the manor in question; for otherwise, although it were false, it is not punishable neither by action nor by indictment upon the statute; for the statute is, if a witness depose falsely concerning any cause &c. for which false oath he is not punishable by the statute, unless it be shewn or averred how this concerns the cause; and of that opinion was the whole Court; and although it is alleged, \**manerium prædict. innuendo*, yet it shall not help it; for a man shall not be punished as a perjurer by an innuendo, wherefore for this cause only the indictment was discharged. Cro. E. 428. Mich. 37 & 38 Eliz. B. R. Anon.

13. The indictment recited the statute of 5 Eliz. and mis-recited it in hoc, that the statute is, *quod quilibet attentus de tali offensa shall lose and forfeit 20 l.* The recital is, *quod quilibet attentus &c. admitteret & forisfaceret 20 l.* so it is *admitteret pro amitteret*, which is not sensible, nor agreeable with the statute; and altho' it was said, that these words are quasi synonyma & de eodem sensu, and the one being well recited is sufficient; yet because they be both in the statute, and the one is mis-recited, it is ill, and there is not any such statute recited; wherefore for this cause, without hearing any of the other exceptions which were offered, because this fault was manifest, the indictment was discharged, and the outlawry reversed. Cro. J. 133. Mich. 4 Jac. B. R. Parker's Case.

For in as much as there is no medium between the 2 branches of this distinction, so that all perjury whatever must needs come within one of them, and it is no way material under which of

14. In action of debt upon the statute, and verdict given for the plaintiff, it was moved in arrest of judgment, that plaintiff omitted in the declaration the words of the statute, viz. *that if any one, either by the subornation of &c. or by their own act, consent, or agreement, wilfully and corruptly commit any manner of perjury &c.* And that the perjury was alleged to be, *that defendant being brought as a witness did swear that the plaintiff succidit & effodit a pear-tree, ubi revera there was no pear-tree growing there* the precise day of the trespass, whereas he should have said, *ubi revera non succidit*; but Coke Ch. J. held the declaration good, and the verdict well given; and to this the whole Court agreed, and judgment was given for the plaintiff. 3 Bullst. 147. Mich. 13 Jac. Cockeril v. Apthorp.

When it doth come, it is a reasonable exposition to look on the said words, as put into the statute ex abundanti, seeing they express no more than the law must needs have implied without them; from whence it follows, that they operate no more than if they had not been expressed, and consequently shall not oblige the prosecutor necessarily to pursue them, which would put him under the difficulty not only of proving the perjury, which alone is material, but also of shewing it to be within one of the branches of the said distinction, which is nothing to the purpose. Hawk. Pl. C. 179. cap. 69. l. 18.

15. It was said at the bar, and not gainfayed, If a man *perjure himself against two*, the one by himself cannot have an action upon the statute, but they ought to join; for he is not the only party grieved. Het. 73. Hill. 3 Car. C. B. Deakins's Case.

16. An indictment on the statute was, *that in a suit in Chancery between A. and B. a commission issued in which the defendant was examined upon interrogatories, whether he knew the land in question &c. ? To which he before the said commissioners, falsely, voluntarily, and corruptly deposed upon his oath, that the soil and freehold [then in dispute] was A.'s, and belonging to his manor of D. where revera it was not A.'s, nor parcel of his manor of D. but parcel of B.'s manor in D. and so committed wilful and corrupt perjury against the statute of 5 Eliz.* Exception was taken for *not shewing what was the issue in Chancery, nor that this land was there in question, nor does it appear that it tended to the proof or disproof of the issue, so as it might be a damage to the plaintiff; and of this opinion was Richardson Ch. J. and Croke J. and tho' the interrogatory mentions it to be the land in question, yet it is not shewn how it is in question; and there can be no indictment upon this statute, but where it is shewn, that the deposition is upon the matter in question, and conducing to the issue, and the party thereby prejudiced.* Jones J. doubted as to the exception; but Berkley J. held it well enough; for it would be too prolix to shew the bill, answer, and issue; and it being alledged that there was a suit in Chancery between them, and the interrogatory being whether he knew the land in question? which shews the land was in question, and a convenient certainty is mention'd, it suffices; otherwise he agreed it was not good; so it was advised (there being two indictments) that he should plead to the one, and thereby try the truth, and the exception should be sav'd. Cro. C. 352, 353. Hill. 9 Car. B. R. Sharp's Case.

17. *Information of perjury at common law was exhibited, and the defendant was found guilty; it was moved in arrest of judgment, that the perjury was supposed to be committed in answering to several interrogatories administered to him in Chancery, which is very uncertain, because it is not shewn in what interrogatory the defendant was perjured; but the Court were clear of opinion, that the information was good notwithstanding this; for every perjury is punishable by the common law, tho' they agreed that the \* statute 5 Eliz. cap. 9. requires greater certainty.* Sid. 106. pl. 16. Hill. 14 & 15 Car. 2, B. R. The King v. Wallengen.

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S. P. Hawk.  
Pl. C. 181.  
cap. 69.  
f. 22.

several interrogatories in Chancery, without shewing in which, this is good at common law, but not upon the statute; per Cur. 5 Mod. 348. King v. Greep.—Sid. 107.—In an indictment for perjury at common law the same certainty is required as is upon the statute; because the statute does not make any thing perjury which was not so before, per Holt Ch. J. Carth. 422. The King v. Greep.

\* S. P. 1 Hawk. Pl. C. 181. cap. 69. f. 22.

18. Exceptions were taken to an indictment of perjury taken at a sessions of the peace, because it was said to be *taken in plena sessione*

*sessione pacis, and it does not appear to be the quarter sessions, as by the statute it ought.* Roll said, It is not enough to say that it was taken in plena sessione, but it must appear in what sessions it was; and it was afterwards quashed, because it did not shew that any of the Justices before whom it was taken were of the quorum, Sty. 123, 124. Trin. 24 Car. B. R. Burton's Case.

19. In an information of perjury, and verdict for the King; the perjury was committed in giving evidence upon a trial in this Court between DUN AND DAWSON. It was mov'd in arrest of judgment, because the information was, *Memorand' quod Thomas Fanshawe miles dat Curia hic intelligi & informari quod termino St. Hillarii 1659, in rotulis continetur sic* (viz.) that Dun brought his action, and recites the whole record of it, and the trial, and that the said Read falsum prestitit sacramentum at this trial; and he moved, that it is not positive that the defendant took a false oath; but that *continetur sic*, that he took a false oath; where he ought to have said after the recital so, *Et ulterius dat' Cur' hic intelligi*, that the defendant took a false oath at that trial; and after consideration the Court gave judgment against the defendant, because the late precedents are so; and now after verdict it shall be taken a distinct sentence betwixt the recital and the et quod; and by Windham the record recited being in this Court, the Judges shall take notice how far the record recited extends, and what that is that is positively rehearsed; and judgment was given accordingly. Raym. 34, 35. Mich. 13 Car. 2. B. R. The King v. Read.

Sid. 148. 20. Information of perjury set forth, that Sir John Lee brought trespass in C. B. for cutting of trees, against Garward, and that the defendant there pleaded Not guilty; and upon the trial there the defendant swears that the said William Garward ultimo Junii 12 Car. 2. did cut 60 trees of the value of 80l. where in truth he did not cut 60 trees of the value of 80l. and verdict against the defendant. And it was moved in arrest of judgment, 1st. *In recital of the action brought in C. B. and the issue joined, it is said that it was awarded, quod venire faceret hic duodecim*, which is in B. R. and so the trial was coram non iudice, and then no perjury can be committed, and cited Yelv. 111. PAIN'S Case. 3 Inst. 166. 2dly, *It is said, that in that action Jurata ponitur in respectum coram Domino Rege*, so an action is begun in C. B. and tried in B. R. and it is not after a verdict; for there is no mention of a verdict to be in that action of trespass, and so not helped by any statute; and for this cause it was staid till &c. But afterward the exceptions were over-ruled, and judgment against defendant to stand on the pillory, and be fined 20l. Raym. 74. Pasch. 25 Car. 2. B. R. The King v. Wright.

Sid. 148. S. C. And as to the objection that it appeared by the record recited, that there are several errors in it, the Court thought it as well as it could be; for had it been otherwise there would have been variance between the record and the indictment, which would be ill; because those errors are not errors of the judgment, but of the first record.

An indictment was removed

21. On a motion to amend an information of perjury it was ruled, that they give notice to the defendant of the things to be amended,

amended, and he to shew cause why they should not be amended; for the Court said it may be amended. Lev. 189. Trin. 18 Car. 2. B. R. The King v. Goffe.

into B. R. last term out of Middlesex against Edwards of

perjury, and he was named Edward all along in the indictment unto the conclusion, and then it was, & sic prædictus Johannes commisit perjurium. The Court was moved, that this might be amended, and it was said, indictments removed out of London have been amended by the original, for they do not certify that but only a transcript; and a jury have been summoned to amend an indictment found in this Court; and in this case, if by examination of the clerk of the peace it appeared that the indictment certified varied from the original, it might be amended; sed Curia advisare vult. Vent. 13. Pasch. 21 Car. 2. B. R. The King v. Bromley.

22. Information for perjury; upon Not guilty pleaded upon the trial, the *record of the trial*, wherein the defendant is alleged to be perjured, was produced, and it *varied from what it was laid in the information*, and at the assizes it was allowed to be found specially; and upon opening the verdict for the defendant, it was resolved by Twissden J. and the whole Court (absente Keling Ch. J.) that the *jury cannot have consence of any variance between the record and the information*; but the Judge at the trial ought to have determined it; and so a venire facias de novo ought to issue. Raym. 202. Mich. 22 Car. 2. B. R. The King v. Sykes.

S. P. 1 Hawk. Pl. C. 181. cap. 69. l. 22.

23. An indictment set forth, that a conventicle was held at D. and that they *movebant, persuadebant & subornaverunt* a certain person to swear that several men were then present, who really were at that time at another place; they were found guilty, and a writ of error was brought to reverse the judgment; the error assigned was, that the indictment does *not set forth that any oath was made*, so it could not be subornation; there is a difference between the persuading of a man to swear falsely and subornation itself; for an indictment for subornation always concludes, *Contra formam statuti*. Curia, It is not enough to say a man suborned another to commit a perjury, but he *must shew what perjury it is, which cannot be without an oath*; for an indictment cannot be framed for such an offence unless it appears that the thing was false which he was persuaded to swear: the question therefore is, if the person had sworn what the defendants had persuaded him to do, whether that had been perjury? But the indictment was quashed, because the words (*per sacramentum duodecim proborum & legalium hominum*) were left out. They held, that if the return had been right upon the file, the record should be amended by it. 3 Mod. 122. Hill. 2 & 3 Jac. 2. B. R. The King v. Hinton and Brown.

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24. Indictment recited the record of a trial, in which the perjury was supposed to be committed, being a feigned issue out of Chancery, setting forth a discourse between Ld. W. and four others, concerning the boundaries of lands, and that Ld. W. affirmed A. to be a boundary, and that three of the four affirmed that it was not; whereupon a wager was laid, and mutual promises made between the Ld. W. and the other four &c. And now at the trial of the indictment, this variance was assigned between the record recited, and the indictment itself; the affirmation laid in the

the record being, that *A. was not the boundary, was made by four*; whereas the indictment laid it to be made by three, omitting the fourth; another variance was, that one of the denominations of the lands in the record were *Barnap*, and in the indictment *Barnep*; and another word in the record was *orientati*, but in the indictment it was *orientali*; but a grosser fault was, that the record of the trial, in which the perjury was alleged, was not entered up, and so it did not appear that ever there was any trial; and Holt Ch. J. denied the minutes of it for evidence; but he said, that by reason of the other exceptions, the indictment being insufficient, they might indict him *de novo*; for an acquittal upon a bad indictment, would be no plea to a good one; whereas had the indictment been good, an acquittal upon the last fault had been peremptory. 6 Mod. 167. Pasch. 3 Annæ B. R. The Queen v. Carter.

See Trial  
(B. f. 6.)  
Perjury.

### (K) Proof.

1. **WHEN** any one takes an oath in a Court, the Court always presumes it to be true until his oath be disproved, and he be convicted of perjury by indictment, or censure in the Star Chamber, or otherwise, and not in an *action sur case*. Cro. J. 601. Mich. 18 Jac. B. R. Ayre, als. Eyre v. Sedgewick.

2. In an information of perjury, *the party, to whose damage the information has concluded, shall not be a witness*; because if the defendant be convicted, this intitles the party to an action upon the statute. Sid. 237. pl. 5. Hill. 16 and 17 Car. 2. B. R. in Case of the King v. Povey, Lambert & al.

3. An information was against B. and others for perjury, and against T. and G. for subornation. The case was thus: *D. being tenant for life*, of lands in Lincolnshire of good value, *remainder to his first son in tail*, and so to his first daughter &c. married M. They came to London and lodged in Chancery Lane, where D. soon afterwards died. *About the time of D.'s death, M. pretended she was lately delivered of a daughter*. Upon a trial at bar in ejectment, between this infant and the remainder-man, *the birth was proved by circumstances usual in such cases, and also by marks*; and the child being in Court was stript and *shewn*. But B. the midwife gave evidence, *that it was not the child of M. but of a poor woman in St Giles's*, which B. and others bought of the woman for 2 s. 6 d. and, by appointment, was brought privately to M. and *she was to make an out-cry*; and that it was put into her bosom, and taken from thence by its thighs when women came to the supposed labour; and that there was a bladder of blood and lambs purtenances provided, and shewed for the after-birth to those who came to the labour, and afterwards burnt; and for giving this evidence B. was indicted of perjury, and the circumstances to prove her guilty were the cutting the navel-strings, the colour of the infant's skin, &c. and that she had received 50 l. of T. and several treats at taverns, by direction of G. who was the

next

Afterwards,  
Pasch. 21  
Car. 2. Up-  
on a trial at  
bar by a  
Jury of Lin-  
colnshire a  
verdict was  
found for  
the plain-  
tiff, viz.  
that it was a  
suppositious  
child. Ibid.

next in remainder with others, and so they were guilty of subornation; and several circumstances were proved to this purpose; but on the other side, *the poor woman and others said, that B. had her child at this time, and that no account was given of it afterwards, unless this was the child, and there was great proof, that after the child was christened at St. Giles's the mother gave it to B. and presumptive proof that the same child was christened again at St. Dunstan's; and it appeared that money had been given to the witnesses on both sides.* Upon the whole, the Jury acquitted the defendants of the perjury and subornation. Sid. 377. Mich. 20 Car. 2. B. R. The King v. Buckworth & al.

4. An answer in Chancery was sworn before J. S. one of the Masters, and upon being excepted to for insufficiency; another answer was *subore* before another Master, *which second answer explained the generality of the first.* As where the first was thus, viz. *She received no money &c. The second was thus, viz. She received no money before such a day &c.* It was ruled by the Court at a trial at bar upon an information, 1. That nothing shall be assigned for perjury which is explained by the second answer, because it clears up what was a perjury before, so as now to be no perjury. 2. That where one is sworn to answer directly and to his knowledge, *no perjury can be assigned in any thing there which is not of his knowledge, as of his belief &c.* 3. That tho' *recital of a deed in other cases is evidence; yet it is not evidence to prove perjury, nor shall it be received by the Court, nor a letter of the party indicted; tho' sworn by one that he believes it to be his hand.* And so the defendant was acquitted. Sid. 418. Trin. 21 Car. 2. B. R. The King v. Carr.

5. An information for perjury was assign'd in certain *depositions in Chancery before Commissioners in the country, an examin'd copy whereof was produced and swore a true copy; it was urged that it ought to be prov'd that the party swore such things, because this was but a copy of what was returned into Chancery by the commissioners, who are neither officers nor on oath, and not like an answer sworn before a Master in Chancery who is a sworn officer.* The Court was divided, and so the copies were not admitted as evidence, the commissioners who took the depositions being all living, and might have been subpœna'd. Whereupon the defendant was found not guilty, without entring on the merits. 2 Show. 486; 487. Mich. 2 Jac. 2. B. R. The King v. Baspoole.

Information for perjury in an affidavit made before commissioners in the country, in a certain cause depending there. The proof of a cause depending was a capias and warrant thereon, and affidavit filed and allowed.

There needs no proof that the party, before whom the affidavit was sworn, was a commissioner, unless disprov'd on the other side; and per Cur. the affidavit being of the defendant in the cause, and used by defendant on motion in Court it is enough, otherwise if not so; but a copy of an affidavit only produced against a man, without proof that he made it, used it, or was concerned in the cause, would be insufficient. Show. 397. Trin. 4 W. & M. The King v. James.

S. P. and seems to be S. C. 3 Mod. 116. Mich. 2 Jac. 2. B. R. Anon. And Serj. Pemberton for the defendant, admitted that an information will lie in this case against him, but the commissioners must be here, or some other person, to prove that he was the person who made oath before them. The commissioners sign the depositions, and they ought to produce them so signed to the Court and prove it; for depositions are often suppressed by order of the Court. If a true copy of an affidavit made before the Ch. J. of this Court be produced at a trial, it is not sufficient to convict a man of perjury. This is not like the case of perjury assigned in an answer in Chancery taken in the country.

for that is under the party's hand; but here is nothing under the defendant's hand, and therefore the commissioners ought to be in the Court to prove him to be the man. The Court were equally divided: the Ch. J. and Wythens J. were of opinion that it was not evidence to convict the defendant of perjury; it might have been otherwise upon the return of a Matter of Chancery; for he is upon his oath, and is therefore presumed to make a good return; but commissioners are not upon oath, they pen the depositions according to the best of their skill, and a man may call himself by another name before them without any offence. The commissioners cannot be mistaken in the oath, tho' they may not know the person; for this Court may be so mistaken in those who make affidavits here, but not in the oath, if the commissioners, or the clerk to the commission had been here, they would have been good evidence.

6. Presumption is ever to be made in favour of innocence; and the oath of the party will have a regard paid to it till disprov'd; therefore to convict a man of perjury, a probable or credible evidence is not enough; but it *must be a strong and clear evidence*, and more numerous than the evidence given for the defendant; for else it is only oath against oath. *A mistake is not enough* to convict a man of perjury; *the oath must be not only false, but wilful and malicious.* 10 Mod. 194, 195. Mich. 12 Ann. B. R. in Case of the Queen v. Muscot.

7. J. S. made an *affidavit in C. B.* and being summoned into Court afterwards *confessed his making it, and that it was false*; whereupon the Court *recorded his confession, and ordered him into custody to be put into the pillory* for perjury. It was objected, that this could not be done upon his own confession, because it is not a conviction, but only a matter of evidence: for that he ought judicially to be brought before the Court by indictment, and therefore his confession ought not to have been recorded; to which it was said, that it is not only a new, but a very strange doctrine, that a criminal shall not be convicted upon his own confession, which is the strongest proof of guilt; and the last day of the Term he was put in the pillory. 8 Mod. 179, 180. Trin. 9 Geo. 1. 1724. The King v. Thorogood.

8. It seems that no one ought to be found guilty thereof without clear proof, *that the false oath alleged against him was taken with some degree of deliberation*; for if upon the whole circumstances of the case it shall appear probable, that it was *owing rather to the weakness than perverseness of the party*, as where it was occasioned by surprise or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which of all crimes whatsoever is the most infamous and detestable. Hawk. Pl. C. 172. cap. 69. §. 2.

9. It is said, that no oath shall amount to perjury, unless it be *sworn absolutely and directly*; and therefore that he who swears a thing according as he thinks, remembers or believes, cannot in respect of such an oath be found guilty of perjury. Hawk. Pl. C. 175. cap. 69. §. 7.

[For more of Perjury see Actions for Rewards, Bankrupt, Subornation, and other proper Titles.]

Per Nomen.

(A) Pleadings.

1. GRANT made to the baron and feme by name of feme without other name of baptism is good, and in pleading her name shall be shewn, and the variance shall not prejudice. And it seems that he shall plead, that it was granted to W. N. and E. his feme by name of W. N. and his wife. Br. Pleadings, pl. 138. cites 30 E. 3. 18. and Fitzh. Feoffments 54.

2. Where a man recovers against a parson who after is made a bishop, the execution shall go against him by name of bishop, and shall count that he recovered against him by name of parson; per Danby and Moyle Justices. Br. Variance, pl. 52. cites \* 9 E. 4. 42, 43.

So where A. B. esquire, entered into a recognizance, and afterwards was made a Knight and

Bart. the capias must be thus, viz. Capias corp. A. B. mil. & baronet, qui per nomen A. B. armigeri recognovit &c. Hob. 129. Sir Geo. Greisly's Case.—\* Br. Nomes, pl. 27. cites 9 E. 4. 44. S. C.

3. In assise against J. S. he pleaded a feoffment made to him by deed, and the deed is J. N. and yet good, for he may be known by two surnames, but the pleading is the better if he pleads per nomen, &c. [but] where he pleads a deed to J. S. and shews a deed made to W. S. [it is not good] for he cannot be known by two proper names. Br. Pleadings, pl. 66. cites 1 H. 7. 28. [ 329 ]

4. So where he pleads of the manor of B. and shews a deed of the manor of S. Br. Ibid.

5. In assise of a portion of tithes in N. in the county of G. twas alleged, that H. 8. dedit & concessit prædictam portionem decimarum inter alia per nomen totius portionis decimarum provenientium &c. de terris dominicalibus archiepiscopi Eborum jacent. & existent. in N. in dict. com. G. nuper monasterio dudum spectant. &c. ac ad tunc vel ruper in tenura E. T. Exception was taken (among other exceptions) to this. But it seems that there needed not any averment, that the lands put in view were the demesne lands of the archbishop in the tenure of E. T. See D. 83. a. b. pl. 77. and 86. b. pl. 99. a. 100, 101, and 102. Pasch. 7 E. 6. The Case of the New Serjeants als. Dean and Chapter of Bristol v. Clerke.

6. If a man will say that such a one was seised of the manor of Dale, and of the manor of Sale, and incoffed him of the manor of Dale by deed, by name of the manor of Sale, this plea is not good; because the per proper nomen does not agree with the premisses, and because it will

not warrant it. Arg. Pl. C. 150. b. Mich. 3 Mar. in Case of Throgmorton v. Tracy.

But if he had said that he had infeoffed him of this land by the name of all his land of the part of his father, it had been good; for this is a good allegation that it is of the part of his father; so it is if the grant be of all his land in such a will. Roll. R. 422. pl. 11. cites 1 H. 7. 28. b.

7. So if a man pleads that *J. S. was seised of 20 acres of land by descent, of the part of the father, and thereof infeoffed him by deed by the name of all his lands which he had by descent of the part of the mother*; this plea is not good; for the per nomen does agree with the premises, and therefore will not warrant the premises. Arg. Pl. C. 150. b. in Case of Throgmorton v. Tracy.

And therefore it was said, if one makes his title to a rent of 20s. and says, that *J. S. was seised of so much*

8. When one pleads by a per nomen a plea of any thing *given by deed*, or other writing whatsoever, if the thing contained in the per nomen *agree in effect* and substance with the premises before the per nomen, then the plea is good, and the premises and the per nomen shall stand as one full and entire matter varying in words, and not in effect. Arg. Pl. C. 150. b. in Case of Throgmorton v. Tracy.

land &c. and granted to him by the deed shewed forth the rent by the name of 20s. rent issuing out of all his lands and tenements; this plea with the per nomen is good, as it is held in 8 H. 4. and the per nomen and the plea stand together. Arg. Pl. C. 150. b. in Case of Throgmorton v. Tracy. — And so a lease of 100 acres of land, and so many of meadow, by the name of yard-land, stand together, and may well so be impleaded. Arg. Pl. C. 151. a. in Case of Throgmorton v. Tracy. — Per Nomen cannot be pleaded unless it be by deed. 3 l.e. 9. Tindal v. Cobb.

9. If the *matter in law* contained in the per nomen will *warrant the premises of the plea*, the plea is good enough, otherwise not, and so cannot be made an exception by itself distinct from the matter in law, but are both one. Arg. Pl. C. 151. Ibid.

10. One brought *wass*, and counted that an abbot *was seised &c. of one house*, and 20 acres of land &c. and demised to the defendant, and that after by surrender and the act of 31 H. 8. the King was seised, and granted to the plaintiff and his heirs the aforesaid tenement by name of the manor of C. with the appurtenances. Exception was taken, that there are not words sufficient in the count to carry to him the lands let, so as that he may maintain a writ of *wass*; for the per nomen cannot maintain the grant of the land in lease *without averment that those in the lease are parcel of the manor*; yet judgement was given to the contrary, and error brought upon the same. D. 207. pl. 14. Mich. 3 & 4 Eliz. Wyburn v. Darrel.

[ 330 ]

11. Plaintiff in ejectment declared of a lease for years of 300 acres of land, 60 acres of meadow, 60 acres of pasture, and 20 acres of wood &c. by the name of *all that the manor of W. habend'* the said manor and other the premises &c. for three years &c. *virtute cujus* &c. he entered &c. And the doubt was, if this was sufficient, or that he should have said *habend. tenement. prædict. &c. and in tenement. præd' &c. intravit*. And adjudged the said count sufficient, and the word *manerium superfluous*. D. 304. pl. 57. Mich. 13 & 14 Eliz. Anon.

12. A.

12. A. by fine conveyed to J. S. *two manors (inter alia) per nomen of two manors, five mesuages, and 300 acres of land*, and by the same fine J. S. rendered a rent of 50 l. to A. and his heirs. On assise brought afterwards of the rent, judgment was for the plaintiff. Error was brought, and among other errors it was assigned, that by pleading this fine of these manors (*inter alia*) it may be intended that other lands passed by this fine; so that an assise brought against him that was tenant only of the manors is not good; for that all the tenants of the land charg'd are to be nam'd. Gawdy and Clench J. held it to be error; for being (*inter alia*) the per nomen shall be intended of more than the two manors, and that the ter-tenants of the residue ought to be named; but Fenner J. contra. Adjournatur. Nota, It was discontinued by the death of the defendant. Cro. E. 226. Pasch. 33 Eliz. B. R. Garnons v. Weston.

S. C. Le. 254. 255. pl. 363. accordingly, and there Fenner J. said, that if one in pleading says, that J. S. was seized of 20 acres, and thereof did enfeoff him, per nomen of Greenmead, this shall not have roserence to the inter alia, but to the 20 acres only.

13. *Warrantia chartæ* of two mesuages and 20 acres of land, and counts that defendant *infeoffed him of the said mesuages and land per nomen unius tofti & 2 virgat. terra*. It was excepted to, because that which comes under the per nomen does not warrant the count; for that the two mesuages cannot pass by any word contain'd under the per nomen. Sed non allocatur; for it may be there was only one toft there at the time of the purchase, and the two mesuages might have been built there since. Judgment for the plaintiff. Cro. E. 611. Pasch. 40 Eliz. B. R. Anon.

14. A copyhold tenement was granted by A. to B. and two others *habend' post mortem J. S.* In trespass against B. he pleaded this grant, but *pleaded it as a grant in possession, and not as in reversion*. And upon demurrer, the record being viewed, it was that A. granted *tenementa predict' per nomen of a mesuage which A. held for life*. And it was resolved to be an incurable fault; for it is not alleged that he granted the tenement in reversion, and the per nomen will not help it; and judgment for the defendant. Cro. E. 661. 662. Pasch. 41 Eliz. B. R. Gay v. Kay.

Cro. E. 822. Pasch. 43 Eliz. B. R. S. C. Grey v. Chapman. — In trespass for taking the plaintiff's beasts at K. Defendants justified the caption as bailiffs of M. and that the place contains, and did contain, when the caption

15. A. had verdict in *ejectment*, and it was moved in arrest of judgment, that the count was of a *lease of ten acres of land by the name of all his lands and tenements in Shoram in Kent*, and judgment was stayed; because there is no place where the ten acres of land are, and that naming the vill in the *per nomen* is not sufficient. Noy. 32. Gray v. Champain.

is supposed, 20 acres of land in K. aforesaid; that long before the caption one A. was seized of 100 acres of land, and 100 acres of pasture in K. aforesaid, whereof the locus in quo is, and at the time of the caption, and time out of mind, was parcel in his demesne, as of fee, containing 20 acres. That A. long before the caption, viz. 18 December, 16 Car. 1. at K. aforesaid, by indenture, in consideration of former service done to him by B. granted to B. and M. his wife a rent of 20 l. a year, issuing out of the said 20 acres, with the appurtenances, by the name of all his lands and hereditaments situate in K. aforesaid, *habendum* the said rent to the said B. and M. and their assigns after the decease of C. and D. or either of them, which first should happen during the lives of B. and M. and the longer liver of them, at Lady Day and Michaelmas by equal portions, the first payment to begin at such of the said feasts as should first happen next after the decease of the said C. and D. or either

either of them. An exception was taken to the conveyance; because it is said, the rent was granted out of the 20 acres, being the *locus in quo*, by the name of all the grantor's lands and hereditaments in K. and that a per nomen in that case is not good. The Court held, notwithstanding the Case of GREY AND CHAPMAN, and the Case of GAY AND CAY; that \* in the present case the per nomen is well enough; because it is alleged that the grantor was seised of 200 acres of land in K. whereof the locus in quo being 20 acres is parcel. By reason whereof, the rent being granted out of every parcel of the 20 acres, it is well enough to say, it was granted out of the 20 acres per nomen of all his lands in K. because the 20 acres are \* alleged to be parcel of all his lands there, being 200 acres. But in CHAPMAN'S CASE, it is not alleged that the 20 acres of land demised were parcel of all the tenements in S. per nomen of which the 20 acres were to pass. As for the other Case of Gay, it was not possible that lands granted as in possession, should pass per nomen of land that was in reversion. Vaugh. 173, 174, 175. Hill. 23 & 24 Car. 2. C. B. Crowley v. Swindles & al.

\* S. P. and if it was granted out of the whole, it was granted out of every part. Freem. Rep. 77. pl. 94. Trin. 1673. and seems to be S. C. by name of Graves v. Aitkenhuit.

This seems to be the Case of DAY. v. FIN. 7 Jac. B. R. cited by Bridgman J. in Roll. R. 412. in the Case of Fawknor v. Fawknor.

16. The plaintiff declared in *ejectment* upon a lease of a house, ten acres of land, 20 acres of meadow, and 20 acres of pasture, by the name of one mesuage, and 10 acres of meadow be it more or less; and upon a Not guilty pleaded, the plaintiff had a verdict; but moved in arrest of judgment, and judgment was stay'd; for by the plaintiff's own shewing in his declaration, he could not have execution of the number of acres found by the verdict; for in the lease there are but ten acres demised; and these words (more or less) could not in judgment of law be extended to 30 or 40 acres; for it is impossible by common intendment, and the rather because the land demanded by the declaration is of another nature than that which is mentioned in the per nomen &c. for that is only of meadow; and the declaration is of arable and pasture. Brownl. 145. Anon.

17. In replevin, the defendant avowed for rent, and made title by a grant of the rent out of the tenements aforesaid, whereof the caption aforesaid is supposed per nomen of all his land which was not then in lease, and did not aver that the place where the caption was, was out of lease at the time of the grant. The plaintiff was nonsuited, and this was moved in arrest of the return, that the avowry was not good; and so held Bridgman, notwithstanding that it was alleged that the grant was out of this land per nomen; but per Haughton contra, the grant being alleged de tenementis prædictis is a sufficient averment that it was not in lease at the time. And Doderidge and Croke seemed to the same intent, and judgment was given accordingly for the avowant. Roll. R. 412. Trin. 14 Jac. B. R. Fawknor v. Fawknor.

Br. Fairs, pl. 33. cites 24 H. 6. 12. per Newton.

18. There is a difference between a *feoffment* and a *release*; a feoffment may be pleaded per nomen without an averment, but a release cannot be so pleaded; for in a feoffment the livery operates to pass the land. Arg. Sti. 270. Pasch. 1651. in Case of Cremer v. Burnett.

S. C. And same exception taken. Cart. 240. but there 242, it was answered, A. G. That

19. In formodon the tenant pleaded a fine of a fourth part per nomen of a third part, and did not aver that it is the same. Exception was taken thereto; but it was answered, that if a per nomen be repugnant or incongruous, it is naught; as is Pl. C. 150. and 3 Cro. 652. but here a third part comprehends a fourth part, and so it is well enough, and cites 1 Cro. 110. [but this book seems

seems mis-cited, whether it means Cro. C. or Cro. E.] Freem. the precedents are always of a third part.

Rep. 126. Mich. 1673. C. B. in Case of Fowle v. Dogle. and not in tres partes dividendas; and that it is good in a fine, tho' not in a writ. Fowle v. Double.—And accordingly a fine of the fourth part pleaded per nomen of a third part, was held well enough by the whole Court; because a third part must necessarily include a fourth, and that it is well enough without saying into how many parts to be divided. And they agreed the Case, F. N. B. 244. 1 Le. 114. that a writ of two parts, not saying into how many parts to be divided, is not good; because \* two parts refer to no certain number of parts, but a fourth part implies a division into four. And besides, there is a great difference between a fine which is a common assurance, and a writ. Freem. Rep. 157. pl. 175. S. C.

\* Le. 115. Trin. 30 Eliz. B. R. in Case of Chamock v. Worsley.

20. It never was known that an ill plea at first was made good by a per nomen, and this appears by the Case of FAWKNER. Roll. R. 422. But by the addition of a per nomen, a count has been made ill (as appears in DAY AND FINN'S CASE. Yelv. 166. [ 332 ] Brownl. 145. Owen 133) Arg. Lutw. 1006. Pasch. 10 W. 3. The King v. Hungerford.

[For more of Per Nomen in general, see Grant (O) &c. (R) &c. Manor, and other proper Titles.]

## Perpetuity.

### (A) What is. And how considered in Law.

1. THERE are two sorts of perpetuities, an absolute one, and a qualified one; and estates tail from the time of the statute de donis till common recoveries were found out were look'd upon as perpetuities. 12 Mod. 282. Pasch. 11 W. 3. C. B. in Case of Scattergood v. Edge.

2. A perpetuity is, where if all that have interest join, yet they cannot bar or pass the estate. But if by concurrence of all having interest the estate tail may be barr'd, it is no perpetuity. Ch. Cases 213. Mich. 23 Car. 2. Washborne v. Downes.

3. A perpetuity is a thing odious in law, and destructive to the commonwealth; it would put a stop to the commerce, and prevent the circulation of the kingdom; per Ld. North. Vern. 164. Pasch. 1683. Duke of Norfolk v. Howard.

4. Every executory devise is a perpetuity as far as it goes, i. e.

an estate unalienable, tho' all mankind join in the conveyance. 1 Salk. 229. Trin. 9 W. 3. C. B. Scattergood v. Edge.

10. 56.  
Mich. 22  
Jac. C. B.  
S. C. —  
6. P. 10  
Rep. 28. b.  
in Porting-  
ton's Case.

5. A. seised in fee gives his lands after his death without issue male to B. in tail, male, until he or they effectually go about to do any acts to alter or discontinue this estate tail, and then to C. and the heirs male of his body with several remainders over. The deviser dies without issue; B. enters; C. dies leaving issue D. — B. levies a fine. D. enters. And the question was, if the entry was good? Resolved per tot. Cur. that this was a perpetuity, and not allowable, being repugnant to law; for by such a limitation an estate tail cannot be determined and given to another; for by the fine the remainder is discontinued and devetted so as D. cannot enter; for it is no limitation to enter but after the effectual going about; and it is not effectual till the act done; and when it is done the remainder is discontinued, and then he cannot enter. Cro. J. 696. Mich. 22 Jac. B. R. Foy v. Hynde.

5. P. be-  
cause 'tis a  
fighting a-  
gainst God.  
Per Ld.  
Chancellor.

6. It is absolutely against the constant course of Chancery to decree a perpetuity, or give any relief in that case; per Ld. Chancellor. 1 Chan. Rep. 144. 15 Car. 1. Bishop v. Bishop.

Trin. 41 Eliz. Cary's Rep. 11. Anon.

7. Trustees of a term limited over in tail, remainder in tail, were decreed in Chancery to convey the estate over; for otherwise there would be a perpetuity; per Bridgm. Ch. J. Sid. 37. Pasch. 13 Car. 2. C. B. in Case of Grig v. Hopkins.

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Pl. C. 414.  
NEWYS &  
SCHOLAS-  
TICA V.  
LARKE

8. A devise to B. and the heirs of his body, and \*if he go about to alien, his estate shall cease, and the lands go over to a charity; it is a void limitation, as tending to create a perpetuity. Vern. 161. Pasch. 1683. Pewterer's Company v. Christ's Hospital.

is contra where the limitation over was on the alienation of the tenant in tail. — \* So, if he attempt to alien &c. He made a feoffment, and held good, and judgment affirmed. Vent. 321. Mich. 29 Car. 2. B. R. Pierce v. Winn.

9. The father settles land on his son in tail male, and takes bond from him, that he will not dock the entail; decreed the bond good. Had not the son agreed to give the bond, the father might have made him only tenant for life; and tho' the alienation is not made by the son, but by his issue, the bill was dismissed with costs; per Commissioners. 2 Vern. 233. Trin. 1691. Freeman v. Freeman.

In this case  
Ld. Cowper  
held, that  
there ought  
to be a strict

10. An attempt to make a perpetual succession of estates for life is vain and not practicable; per Cur. 2 Vern. 738. Hill. 1716. Humberston v. Humberston.

settlement made, and the intent of the testator followed as far as the rules of the law will permit, and directed it to be made so, that such as were in being should be only tenants for life; but where the limitation was to be to a person not in being, he must be made tenant in tail male. Ibid. — Ch. Prec. 455. S. C.

11. Chattel leases cannot be entailed. MS. Tab. cites Feb. 28th, 1725. Rushout v. Rushout.

12. A

12. A perpetuity, as it is a legal word or term of art, is the limiting an estate either of inheritance or for years so as would render it unalienable longer than for a life or lives in being at the same time, and some short or reasonable time after. 2 Wms's Rep. 620. by the Master of the Rolls. Mich. 1732. in Case of Stanley v. Leigh.

[For more of Perpetuity in general, see Condition, Custody-Devisé, Remainder, and other proper Titles.]

## Per quæ Servitia,

(A) *What it is. And in what Cases it lies. And for whom.*

1. THIS is a writ of execution. Br. Per quæ Servitia, pl. 7. cites 39 E. 3. 19. Per Thorp.

2. Where there are two lords, and the one grants the seignior by fine, the tenant is not compellable to attorn. Br. Per quæ Servitia, pl. 13. cites Old. N. B. Per quæ Servitia.

If a man make a gift in tail, the remainder in fee, and

the seignior or rent charge issuing out of the land be granted by fine, the donee shall maintain a per quæ servitia, or a quem redditum, and compel him to attorn; for herein his estate of inheritance is no privilege to him; because a tenant in fee simple (as his estate was at the common law) is also compellable in these cases to attorn. Co. Litt. 316. b.

3. It does not only lie where a man grants the services of his tenant for term of life, but also where the lord grants the services of his tenant in fee simple. Br. Per quæ Servitia, pl. 13. cites 9 E. 2. [ 334 ] And therefore Brook says Natura Brevium is mistaken.

F. N. B. 147. (A).

4. This action does not lie but upon grant by fine, and not by deed. Br. Per quæ Servitia, pl. 1. cites 43 E. 3. 8.

5. If a man grants services to J. S. for life, the remainder to W. N. in fee, and after J. S. dies before any attornment, W. N. shall have per quæ servitia. Br. Per quæ Servitia, pl. 10. cites 20 H. 6. 7.

6. Lord, mesne, and tenant; the mesne granted the mesnalty to A. by fine for term of life, the remainder to J. S. in fee; the grantee for life brought per quæ servitia, and the tenant came ready to attorn saving his acquittal, and the plaintiff confessed it, and the tenant attorned; the grantee for life died: he in \* remainder cannot

\* S. P. which must be in a per quæ servitia brought by him against the tenant.

Co. Litt. 320. b.— cannot *disfrain* till he has *confessed the acquittal*. Br. Per quæ Servitia, pl. 12. cites 18 E. 4. 7. per Cur.  
 S. P. for he has right to the remainder, and is privy in estate. Co. Litt. 252. a.

(B) *Against whom it lies.*

1. **T**HIS writ lies as well *against tenant of the fee simple* of the land, as *against other tenant*. Br. Per quæ Servitia, pl. 13.

2. If *baron and feme bring per quæ servitia*, and the *tenant says that he is ready to attorn, saving to him his acquittal*, and the *baron alone confesses the acquittal* for him and his heirs, and not the feme, and the *baron dies*; his heirs shall be bound to the acquittal in the life of the feme, and yet the heir is not lord. Br. Per quæ Servitia, pl. 13. cites H. 5. E. 3.—For *feme cannot confess acquittal without examination*, and examination does not lie in this action. Ibid.

3. If *per quæ servitia* be brought *against him who is not tenant the day of the writ*, yet he shall attorn if he was *tenant the day of the note levied*; for he who was tenant the day of the note levied shall attorn in *per quæ servitia*, quem redditum reddit, & quid juris clamat. Br. Per quæ Servitia, pl. 5. cites 8 H. 6. 17.

4. If a fine is levied of a *seignior*y, and *before the attornment the tenant makes feoffment over in fee*, there the attornment of the feoffee is good, if he will attorn; but by all the Justices of C. B. *per quæ servitia* does not lie *against the feoffee*, nor against any other, but against him who was tenant at the time of the fine levied; for the *per quæ servitia* shall not vary from the fine. But per Littleton, *Per quæ servitia* lies well against the feoffee for avoidance of mischief; for it may be, that the feoffor may die without heir, and therefore it shall lie against the feoffee; for *scire facias* \* upon a fine lies against the feoffee, and so here; but Curia e contra. Br. Per quæ Servitia, pl. 9. cites † 18 H. 4. 10.

\* Orig. (vers le). † This is mistaken for 18 E. 4. 10.

(C) *Pleadings.*

1. **I**N a *per quæ servitia* issue was taken upon the quantity of the services. Br. Issues joined, pl. 79. cites 20 E. 3. & Fitzh. Per quæ Servitia, 11.

2. In *per quæ servitia*, the *tenant said, that the conusor had nothing in the services but in tail and shewed part of the fine levied of the services in tail to the ancestor of the conusor, to whom he attorned, judgment if now he shall be compelled to attorn to the discontinuée*; for then the issue in tail may, after the death of the conusor, *distrain him*, and the second conusor also, and so he shall be *attendant to*

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two

*two lords*; and therefore a good plea; quod nota; and this by reason that he shewed part of the fine of the tail; and nonsuit in this action is not peremptory. Br. Per quæ Servitia, pl. 6. cites 24 E. 3. 25.

3. In per quæ servitia, Candish said, The mother of the conusor was seised in fee after the statute of quia emptores terrarum, and infeoff'd us by this deed in fee, judgment &c. But per Thorp, the best issue is, *that the ancestor was seised and infeoff'd him, and so you did not bold of the grantor*, and the issue was taken accordingly; and the defendant cannot have common day; for this is a writ of execution; and the defendant made attorney. Br. Per quæ Servitia, pl. 7. cites 39 E. 3. 19.

4. Per quæ servitia against three, whereof two came, and the third made default, and demanded judgment, *if the two alone shall be put to answer*; because it shall be intended by the bringing of the writ, that they are tenants in common; & non allocatur; by which they demanded what land, and by what services they held of the conusor. But the plaintiff was not compell'd to shew it; but the defendants themselves shall shew it, because it is in their advantage. Br. Per quæ Servitia, pl. 11. cites 21 E. 4. 48.

[For more of Per quæ Servitia in general, see Attornment, and other proper Titles.]

## Personal.

(A) Personal Things. *What Things are so personal that they cannot be transferr'd.*

1. **POWERS** are not transferable over. Arg. Mo. 520. Mich. 37 & 38 Eliz. in the *Ld. Buckhurst's Case*.

2. *Redemption of a pawn* is redeemable only during the life of pawnor, and not by his executor. Yelv. 178. Trin. 8 Jac. B. R. Ratcliff v. Davis.

3. Things annexed to the person cannot be transferred nor executed by another; as *Arbitrement—Suit at Court—Homage—Fealty*. Arg. And also agreed that *tenant for life with power to make leases* cannot make livery by attorney, nor executors that have power to sell, but where they have interest it is otherwise.

Arg

Arg. 2 Roll. R. 393. Mich. 21 Jac. cites 9 Rep. . . .  
Combes's Case.

S. P. Ibid.

368. in Case

of Sydown

v. Holme—

S. P. Ibid. 370. in S. C.—

Leech.

4. A *privilege* does not extend beyond the person. Jo. 190.  
Hill. 4 Car. B. R. in Case of Whitton v. Whelton.

5. Whether a prebendary can grant a *power* to his lessee to  
make a *commissary* within his prebendary? Court divided. Raym.  
88. Hill. 15 & 16 Car. 2. B. R. Sharrock v. Boucher.

6. *Dignities of peerage* are so personal, and annexed to the  
blood, that it cannot be transferr'd to any other person, or  
surrendered to the Crown. Arg. Parl. Cases 1. The King v.  
Lord Purbeck.

[ 336 ] 7. If the King grant a tract of land in the plantations abroad  
to a man with a *legislative power*, which grantee passes over to  
another; the legislative power shall not pass as a privilege annexed  
to the land, but remains with the person of grantor. Per  
Holt Ch. J. 12 Mod. 399. Pasch. 12 W. 3. in a Case between  
Basse and Bellamount.

[For more of Personal, see Assignment, Guardian, and  
other proper Titles.]

## (A) Personating.

Br. Nofme, 1. DEBT upon a bond by J. F. the defendant said, that he  
pl. 65. cites made and delivered the bond to another J. F. and not to the  
S. C. plaintiff; and a good plea; and the plaintiff was compell'd to  
answer to it; quod nota: and so it seems that there were two  
J. F.'s, and the wrong J. F. got the bond, and brought the  
action. Br. Obligation, pl. 82. cites 12 H. 6. 7.

2. A. had a warrant to arrest J. S. and A. demanded of a  
stranger what his name was, who said his name was J. S.  
whereupon A. arrested him. The stranger brought false imprisonment;  
and adjudg'd it lay; for the bailiff ought at his peril  
to take notice of the party. Mo. 447. Trin. 38 Eliz. Coot v.  
Lightworth.

Cro. E. 3. A. levies a *fine* in the name of B.—B. being beyond sea;  
531. S. C. and sentence was given that the fine should be void. Noy. 99.  
—Mo. 630. Mich.

Mich. 38 & 39 Eliz. in the Star-Chamber. Gillibrand v. S. C.—  
Hubbard.

12 Rep.  
123. cites  
S. C. but

says that part of the sentence was, that if the defendant did not *re-assure the land to the plaintiff*, he should forfeit a *greater fine to the Queen*; but that there was no sentence to draw the fine off the file, nor damages awarded to the plaintiff.—A reconveyance was decreed. Roll R. 115. cites S. C.—The person was fined and imprisoned, and a *vacat* entered on the roll. Cro. E. 531. S. C. by name of Hubert's Case.

Lord Keeper said, He had always noted this *difference*. If *one of my name levies a fine of my land in my name*, I may well confess and avoid this fine, by shewing the special matter. But if a stranger, who is *not of my name*, levies a fine of my land in my name, I shall not be received to *avert* that I did not levy the fine, but another in my name; for that is *merely contrary to the record*; and so it is of a recognizance, and other matters of record. But he conceived, that when the *fraud appears to the Court*, as in the principal case, they may well enter a *vacat on the roll*, and so make it no fine, altho' the party cannot avoid it by *avertment*, during the time that it remains a record. Cro. E. 531. Mich. 38 & 39 Eliz. Hubert's Case.

4. A. acknowledges an *action* in the name of B. and sentence was given that (*vacat*) shall be made upon the roll. Noy. 99. in the Case of Gillibrand v. Hubbard. Per Popham, who cited Holcomb's Case. Cro. E. 531.

5. A. being *bail* for J. S. gives his name in to be B. Plaintiff recovers, and after judgment and execution awarded against B. upon proof that B. was not at London at the time of the bail taken, and it being confessed by J. S. and those that procured the bail, that A. put in the bail, a *vacat* was ordered *quoad* B. of that bail, and of the judgment in the *scire facias*. Cro. J. 256. Mich. 8 Jac. B. R. Cotton's Case.

B. was taken  
in execution  
upon a re-  
cognizance  
of bail, and  
he made it  
appear to  
the Court,  
that he  
never ac-

knowledge the recognizance, but was personated by another; and thereupon it was moved, that the bail might be vacated and he discharged, as was done in *Cotton's Case*. 2 Cro. 256. But the Court said, Since 21 Jac. c. 26. by which this offence was made felony without clergy, it is *not convenient to vacate it until the offender is convicted*; and so it was done 22 Car. 2. in *Spicer's Case*; wherefore it was ordered, that B. should bring the money into Court, and be let at large to prosecute the offender. Twisden said, It must be tried in *Middlesex*, tho' the bail was taken at a Judge's chamber in *London*, because filed here, and the entry is *Venit coram Domino Rege &c.* So it differs from a recognizance acknowledged before my Lord Hobart, upon 23 H. 8. at his chamber, and recorded in *Middlesex*, there the *scire facias* may be either in *London* or *Middlesex*. Hob. Rep. 195. 196. Vent. 301. Beasley's Case—Mod. 46. S. P. Rawlin's Case. [ 337 ] Cockeril, who personated Beesley, was hanged at Tyburn, but the rope was immediately cut; and afterwards Beesley on *motion* had *restitution of his goods in the hands of the Sheriff*. Hill. 128 Car. 2. B. R. 2 Jo. 64. Beesley's Case.

6. A *commission of rebellion* was awarded against A. Whereupon B. came before the commissioners, and *affirm'd himself to be the person*. The commissioners apprehended him by virtue of their commission; but per Hale Ch. B. the commissioners having no warrant to take him by their commission, his affirming himself to be the person will not excuse them in *false imprisonment*, as has been held on the executing a *capias*. Hard. 323. Pasch. 15 Car. 2. Thurbane's Case.

[For more of Personating in general, see Cheats, Fines, and other proper Titles.]

## Petitions in Chancery.

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(A) *What it is, to whom they must be, and in what Cases, and how it may be granted.*

S. P. Curf.  
Canc. 420.

1. IT is a person's *request in writing* directed to the Lord Chancellor or Master of the Rolls, shewing some matter or cause whereupon he prays somewhat to be granted or done for him. P. R. C. 269.

S. P. Curf.  
Canc. 421.  
—Or for favour; as to have time enlarg'd for answering, for publication: to

2. Most things which may be mov'd for of course, may be petition'd for; as a commission to answer, or plead, and demur; for the Lord Chancellor's letter to a Nobleman to appear and answer a bill &c. that the cause may be heard; for a rehearing; for an appeal &c. or to have a mistake amended in a caption &c. P. R. C. 269.

husen joining in commission &c. for paying money. P. R. C. 269. — S. P. Curf. Canc. 421. — To have a bardship removed; as that process of contempt may be stay'd, and that the defendant may have a copy of the bill, where there being many defendants, who employ several clerks, the clerk of one of the defendants cannot get him a copy of it, whereby process of contempt is issued out against him for not answering. P. R. C. 269. — S. P. Curf. Canc. 421. — And in many other the like cases petitions in Chancery are usually preferred, subsequent to the bill filed. But in some cases a petition may be precedent to the suit &c.; as for a person to be admitted in forma pauperis, or to be assign'd a guardian &c. Ibid.

S. P. Curf.  
Canc. 421.

3. Sometimes it is upon a collateral matter only, as it has relation to some precedent suit, or to an officer of the Court, as to have a clerk or solicitor's bill taxed, or to oblige him to deliver up papers. P. R. C. 270.

S. P. Curf.  
Canc. 421.

4. The Master of the Rolls is not to be petitioned for rehearings, but the Chancellor; also the Chancellor only is to be petitioned touching pleas, demurrers or exceptions, or touching decrees or special orders made before the Chancellor. In most other cases of petition, the Master of the Rolls may be applied to. P. R. C. 270.

[ 338 ] (B) *What may be done upon a Petition without a Bill.*

1. WHERE the King has a right as *pater patriæ* to take care of his subjects, as in cases of charities, idiots, lunatics and infants; this is delegated to, and falls under the direction of the Court of Chancery, which in consequence thereof hath used,

used, upon petition only, without any bill or decree, to make orders touching the determination of such right. Vide 2 Wms's Rep. 118. 119.

2. *Right of guardianship* was determined on petition against the mother, she being a papist; and upon an appeal from Chancery to the \* House of Lords, they determined the right against the mother, and no objection was made as to the determining it on petition only. Per Lords Commissioners. 2 Wms's Rep. 120. cites 18 March 1718. Lord Teynham and Barret's Case.

\* April 1724. So in the case of a *testamentary guardian*, such guardian having a plain legal right upon

the words of the will, and the whole case arising thereon, there can be no need of a bill in equity, no proofs of either side are requisite, or can avail; and therefore the matter is properly determinable upon a petition without a bill. 2 Wms's Rep. 120. Per Lords Commissioners. Hill. 1722. in Case of Eyre v. Lady Shaftsbury.

3. No former order made in Court is to be altered, crossed, or explained upon any petition, but such orders may be only stay'd upon it for a small time, till the matter may be moved in Court. P. R. C. 270.

S. P. Curf. Canc. 421. and 422.

4. No commissioners for examination of witnesses shall be discharged, nor shall any examinations or depositions of witnesses be suppressed upon petitions, unless the matter be first referred, and certificate had thereupon. P. R. C. 270.

S. P. Curf. Canc. 421.

5. No sequestration, dismissal, retainer upon dismissal, or final order is granted on petition. P. R. C. 273.

S. P. Curf. Canc. 421.

commitment of any person taken upon process of contempt to be discharged, but upon adverse party, his attorney or clerk, towards the cause. P. R. C. 273.—S. P. Curf. Canc. 422.

### (C) What is to be done in case an Order is made upon the Petition.

1. Petitions are delivered out of Court, and if it be for a matter of course, as to be admitted in \* forma pauperis, or such like, it is forthwith granted, and signed. If it be for any thing which requires examination, or that the adverse party be heard, then it is commonly ordered, that all parties attend the next day of petitions, or general seal; at which day the matter is debated, and ordered as the Court sees cause. Affidavits are in such case often necessary to inform the Court how matters stand on each side. P. R. C. 271.

S. P. Curf. Canc. 422.

\* A petition (even to be admitted in *forma pauperis*) must now be on double sixpenny stamps. 271. P. R. C.

—S. P. Curf. Canc. 423.

2. If there be occasion to petition out of term and general seals too, and the matter is of consequence, and requires dispatch, a petition may be delivered, and the parties will be ordered to attend the Ld. Chancellor or Master of the Rolls, at a time therein appointed, and have justice done them; for this Court is always open. P. R. C. 271.

S. P. Curf. Canc. 422.

3. An order upon a petition for attending and hearing the matter, must be drawn up, past, and served, as other orders; and

S. P. Curf. Canc. 422.

and a copy of the petition is also to be delivered to the party served. P. R. C. 271.

[ 339 ]  
S. P. Curf.  
Canc. 423.

4. In 1647, there was an order made, that *no officer should issue a subpoena, attachment, or other process, nor proceed or admit of any proceedings in any cause depending in this Court upon a petition signed by the Lords Commissioners, or the Master of the Rolls, until the petition were first filed with the register, and an order drawn, and entered thereupon. All process and proceedings otherwise issued, and had thereupon, should be null and void, and not bind the adverse party.* P. R. C. 272.

S. P. Curf.  
Canc. 423.

5. In 1687, it was ordered, that *no order made upon any petition (unless the same be by way of summons) should be of any effect to ground subpoenas or other process upon, unless within three days in Term time, or a week in the Vacation, after the same should be granted, an order were drawn, and entered up with the register, on such petition, to the end no person might be surpris'd with any private order.* P. R. C. 272.

S. P. Curf.  
Canc. 421.

6. *No injunction for stay of suits at law shall be granted, revived, dissolved or stayed, upon petition; nor shall an injunction of any other nature pass by order upon petition, without notice, and a copy of the petition first given the other side. The petition to be filed with the register, and the order entered.* P. R. C. 272.

S. P. Curf.  
Canc. 421.

7. Said in Court, where a *matter comes in by petition*, and the *other side* would discharge the order, or have any thing relating to the matter, he *ought regularly to do it by petition*; tho' the Court sometimes will grant it upon motion. P. R. C. 273.

[For more of Petitions in Chancery in general, see Petition, and Monstrans de Droit at Title Prerogative, and other proper Titles.]

## Physicians and Surgeons.

(A) Physicians and Surgeons of London incorporated.  
*How. And their Power.*

1. 3 H. 8. cap. E. Na. 6. That *no person within the city of London, or seven miles thereof, shall practise as a physician*

fician or surgeon, unless he be first examined, approved and admitted by the Bishop of London, or the Dean of St. Paul's, assisted by four Doctors of physick, and for surgery by four expert persons in that faculty, on pain of *sl.* one moiety to the Crown, and the other to him that will sue for the same.

S. 2. And no person beyond the said city and precinct of seven miles, unless approv'd as aforesaid, shall practise physick or surgery in any diocese within this realm, except he be first approved by the bishop of the diocese, and in the bishop's absence, by his vicar-general, assisted by such expert persons in the said faculties as they shall call for that purpose, and give their letters testimonial to, upon the like pain, to be levied and employed as aforesaid.

S. 3. Provided that this act be not prejudicial to the Universities of Oxford or Cambridge, or to any privilege granted them.

2. By 5 H. 8. cap. 6. Surgeons of London are discharged of serving as constables, watch, and all manner of offices bearing any armour, and also of all inquests and juries within the city. And this act is declared to extend to all barber-surgeons admitted and approved according to the aforesaid act of 3 H. 8.

3. By 14 & 15 H. 8. cap. 5. s. 2. The King's Charter for the Incorporation of the College of Physicians in London (bearing date the 13th of September in the 10th year of his reign) is confirmed; the substance whereof is as follows: [ 340 ]

A perpetual College of Physicians is granted and erected in London, and within seven miles compass of the same, and shall also have perpetual succession, a common seal, and ability to purchase lands not exceeding 12l. per annum. They may sue and be sued, make ordinances for the good government of the College, and of all others that practise physick within the said limits; neither shall any practise physick within that circuit, unless approved under the seal of that College, in pain of *sl.* to be divided between the King and the same College; likewise four physicians shall be yearly chosen to supervise the rest, as also their medicines and receipts, so that such as offend may be punished with fines, amerciaments, imprisonment, or other due means. Lastly, Physicians shall not be put upon inquests in London or elsewhere; bowbeit, these letters patents shall not be prejudicial to the city of London, nor the liberties thereof.

In an action of false imprisonment the defendants justified, under this statute, setting forth, That the plaintiff practised physick not being admitted &c. That being examined, he was found insufficient

and forbid to practise. but notwithstanding such prohibition, he afterwards practis'd for a month or more, whereupon they amerc'd him *sl.* to be paid to them at their next assembly &c. and likewise injoin'd him to forbear practising any more until he be found sufficient &c. under pain of imprisonment. That he continuing still to practise was further fin'd and order'd to be committed. That being question'd, if he would submit to the said College? he replied, that he had practis'd and would practise without leave of the College, and denied that by the statute they had any authority over him, as having taken his degree of Doctor of Physick within the university regularly, and so thought himself protected by that clause in the act; whereupon the Censors (defendants) order'd him to prison, which was executed accordingly, and for this imprisonment this action was brought. In this case Daniel J. thought a doctor of physick of either university was not within the body of the act; but suppose him to be within the body, yet he was excepted by the last clause. But Warburton J. e contra upon both points. Coke Ch. J. said nothing as to either of these points, because all three (and who were all the Judges present) agreed, that this action was clearly maintainable for two other points; and they resolv'd, 1. That the Censors had no power to commit the plaintiff for any of the causes mention'd in the bar. Because the said clause, which gives power to the said Censors to fine and imprison, does not extend to the said clause, viz. That none in the said city &c. exercise the said faculty &c. which prohibits every one from practising physick in London &c. without licence of the President and College; but extends only to punish those who practise in London, *pro delictis suis in non bene exequendo, faciundo & uendo facultate medicinae*, so that their

power is limited to the ill and not to the good use and practice.—2. Admitting that the censors had power, yet they have not pursu'd it. 1. Because *the censors alone have power to fine and imprison, whereas here the president and censors impos'd this fine of 5*l*.* 3. The plaintiff was *summoned to appear before the president and censors*, and for not appearing was fined 5*l*. whereas the president had no authority. 4. The *finis impos'd by them by virtue of this act belong to the King*, and not to them, and yet the fine is *limited to be paid to themselves &c.* and for nonpayment have imprisoned him. 5. They *ought to have committed the plaintiff immediately*, tho' no time be limited in this act. 6. Their *proceedings ought not to be by writ*, inasmuch as their authority is by patent and act of parliament, and especially it being to fine and imprison. 7. The act giving a *power to imprison until be be delivered by the president and censors or their successors shall be taken strictly*, or otherwise the liberty of the subject is at their pleasure. And this is well proved by a judgment in parliament in the same case; for when this act of 14 H. 8. had given the censors power to imprison, yet it was taken so literally, that the gaoler was not bound to receive such as they should commit to him, *because they had authority to imprison without any Court; and thereupon the statute 1 Mar. cap. 9. was made to compel the gaoler to receive them under a penalty*, and yet none can commit to prison unless the gaoler receives him; but the 14 H. 8. was taken so literally that no necessary incident was implied. And it being objected that 1 Mar. cap. 9. had enlarged the power of the censors, as appeared by the words of the act, it was clearly resolv'd, that *it does not enlarge their power to fine and imprison for any matter not within the 14 H. 8. the words of the act of Queen Mary being, (according to the tenor and meaning of the said act); and further shall commit any offender &c. for his &c. offence or disobedience contrary to any article or clause contained in the said grant or act, to any ward, gaol &c.* And in this case it does not appear by the record, that the plaintiff has done any thing contrary to any article or clause within the grant or act of 14 H. 8. And for the two last points judgment was given for the plaintiff, nulla contradicente as to them. 8 Rep. 107. to 111. Mich. 6 Jac. Dr. Bonham's Case.

Ld. Ch. J. Coke, in the conclusion of his argument, observes these *seven rules for the better direction of the president and commonalty of the said College* for the future. 1. That none can be punish'd for practising physick within London, but by forfeiture of 5*l*. a month, which is to be recovered by law. 2dly, If any practise physick there for less time than a month, that he shall forfeit nothing. 3dly, If any person prohibited by the statute offend in non bene exequendo &c. they may punish him according to the statute within the month. 4thly, Those whom they commit to prison by the statute ought to be committed immediately. 5thly, The fines which they assess according to the statute belong to the King. 6thly, They cannot impose fine or imprisonment without making a record thereof. 7thly, The cause for which they impose a fine and imprisonment ought to be certain; for this is *traversable*; for tho' they have letters patents and an [ 341 ] act of parliament, yet inasmuch as the party grieved has no other remedy, neither by writ of error or otherwise, and they are not made Judges, nor a Court given to them, but have authority only to do it, the cause of their commitment is *traversable* in action of false imprisonment brought against them. 8 Rep. 120. b. 121. a. in Dr. Bonham's Case.

\* Holt Ch. J. in delivering the opinion of the Court, said, that notwithstanding the opinion in Doctor Bonham's Case, the charge of male administration of physick is not *traversable*, and that my Ld. Coke's opinion in that case was but obiter, and no judicial opinion: besides that he seemed to have been under some transport, because Doctor Bonham was a graduate at Cambridge, his own mother university. And he himself after in the same case says, that if the censors do convict a man for such offence, they ought to make a record of it; and that they cannot do unless they are Judges of Record; and then we say, their proceedings are *untraversable*, and they unanswerable for what they do as Judges. 12 Mod. 328, 389. Pasch. 12 W. 3. in Case of Dr. Grenville v. the College of Physicians.

In an action for practising physick within 7 miles of London without licence, the case upon a special verdict was, that the defendant, being an *apothecary* by trade, was sent to by J. S. then sick of a certain distemper; and he having seen, and being inform'd of the said distemper, did, *without prescription or advice of a Doctor, and without any fee for advice, compound and send the said J. S. several parcels of physick as proper for his said distemper, only taking the price of his drugs*; and if this were a practising of physick, such as is prohibited by the statute, was the question: and after several arguments, the Court at last unanimously agreed, that *practising of physick within this statute consists, 1st, In judging of the disease and its nature, constitution of the patient, and many other circumstances.* 2dly, In judging of the *fittest and properest remedy* for the disease. And 3dly, In directing and ordering the application of the remedy to the diseased. And that the proper business of an Apothecary is to make and compound, or prepare the prescriptions of the Doctor pursuant to his directions. It was also agreed, that the defendant's taking upon himself to send physick to a patient as proper for his distemper without taking ought for his pains, is plainly a taking upon himself to judge of the disease, and fitness of remedy, as also the executive or directing part. Et not. Cur. Plaintiff had judgment. Note, This judgment was reversed in Domo Proccurum. 6 Mod. 44. Mich. 2 Ann. B. R. College of Physicians v. Rose.

*There shall be eight of the College called Elects, who from amongst themselves shall yearly chuse a president: and as any of the elects*  
*said*

fail (by death or otherwise) others shall be chosen in their places by the survivors of the same elects.

S. 3. None shall practise physick in the country without a testimonial of his sufficiency from the president, and three of the elects of the same college, unless he be a graduate in one of the universities.

One that has taken his degree of Doctor of Physick in

either of the universities may not practise in London, and within 7 miles of the same, without a licence from the College of Physicians; per Cur. clearly, and that by reason of the charter of incorporation, confirmed by 14 & 15 H. 8. cap. 5. penn'd in very strong and negative words. As to the testimonials granted by the universities upon a person's taking the Doctor's degree, the Court was of opinion, that these might have the nature of a recommendation, and give a man a fair reputation, but conferred no right; and consequently all those statutes which have confirmed the privileges of the universities could revive or confirm nothing but the reputation that this testimonial might give such graduates. And as to the last clause of this statute, That none shall practise in the country without a licence from the president and 3 elects, unless he be a graduate of one of the universities; it was said, that all the inference from that would be, that possibly two licences may be necessary where a person is not a graduate. In the Case of Doctor LAYT, Lord Ch. J. Holt did not think this a question worth being found specially. The College of Physicians without doubt are more competent judges of the qualifications of a physician than the universities; and there may be many good reasons for taking a particular care of those that practise physick in London. Adjournatur. 10 Mod. 353, 354. Hill. 3. Geo. 1. B. R. College of Physicians v. Doctor West.

4. 32 H. 8. cap. 40. s. 1. enacts, That all members of the College of Physicians in London, shall be discharged of keeping watch or ward in the said city and suburbs thereof; nor shall any of them be chosen constable or other officer within the said city or suburbs, and every such election shall be void.

S. 2. And it shall be lawful for the President and Fellows of the said College, yearly to chuse four of their number, who shall have power, after they are sworn, to enter the house of any apothecary in the said city, to search and view his wares and drugs, and such as they shall find defective and corrupted, having called to their assistance the wardens of the mystery of apothecaries, or one of them, shall cause to be burnt or otherwise destroyed. And every apothecary that shall deny the said four Physicians entrance into his house &c. to search and try his drugs, shall forfeit 5l. one half to the King, and the other to him that will sue for the same; and every of the said persons so chosen, refusing to be sworn, or to make the said search once in a year, having no lawful impediment, shall forfeit \* 40s.

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\* Cay's Abridgment is only 10s. each.

S. 3. And every member of the College of Physicians is hereby authorised to practise surgery in London, or elsewhere within the realm.

5. 32 H. 8. cap. 42. s. 1. enacts, That the barbers and surgeons of London are by this act united and made one body corporate, called by the name of Masters and Governours of the Mystery and Commonalty of Barbers and Surgeons of London; and all members of the said company, who shall be admitted to practise surgery, shall be exempted from bearing of armour, and from being put upon watches or inquests: and the said company, and their successors, shall have the oversight and correction, as well of freemen as foreigners, for such offences as they shall commit against the good order of barbery and surgery, as heretofore among the said mystery and company of barbers of London hath been accustomed.

S. 2. And the said company of barber-surgeons shall have free liberty yearly, to take four persons condemned for felony, for anatomies yearly.

S. 3. And no barber in London, or within one mile thereof, shall practise surgery, letting of blood, or any other thing relating thereto, except drawing of teeth; nor shall any person who practises surgery within those limits, exercise the craft of a barber; and all persons practising surgery in London, or within one mile thereof, shall have an open sign in the street where they dwell, that all people may know where to resort to them.

S. 4. And no person shall have or keep a barber's shop in London, unless he be a freeman.

S. 5. And there shall be chosen yearly four Masters for the said company, of which two shall be expert in surgery, and the other two in barbering, who shall have power to punish and correct all defaults in the said company; and every person who shall offend in any of the articles aforesaid, shall forfeit 5l. for every month he shall so offend, one moiety to the King, and the other to him that will sue for the same.

S. 6. Provided that the said barbers and surgeons shall pay, scot and lot, and other charges as formerly.

S. 7. Provided it shall be lawful for any person, not being a barber or surgeon, to retain in his house as a servant, a barber or surgeon, who may exercise his art in his master's house, or elsewhere, by his licence.

6. 34 & 35 H. 8. cap. 8. f. 3. enacts, That it shall be lawful for any of the King's subjects, having knowledge and experience in the nature of herbs, roots, and waters, or applying the same to practice, to minister to any outward sore, wound, imposthume, outward swelling or disease, any herbs, ointments, baths, and plaisters, according to their skill; and also drinks for the stone and strangury, or agues, without incurring any pain by the said statute. 3 H. 8. cap. 11.

Debt upon the statute 14 H. 8. cap. 5. by the plaintiff, as President of the College of Physicians in London, and of the Corporation of Physicians there, for that the defendant used the art of

7. By 1 Mar. cap. 9. f. 2. 4. The aforesaid act of 14 H. 8. cap. 5. for incorporating the Physicians of London is confirmed; and it is enacted, that whoever shall be committed to prison by the President of the said corporation, or such as shall be elected yearly, for the correction of offenders, to any prison within the said city or precinct, except the Tower of London, the keeper of such prisons shall receive in custody such offenders, as shall be so committed, without bail or mainprise, until such offender shall be discharged by the President and such persons as shall by the said College be thereunto authorised, upon pain that such keeper shall forfeit double the fine that such offender shall be assessed to pay, so that the said fine do not at any one time exceed the sum of 20l. one moiety whereof shall go to the Crown, and the other to the said President and College.

London without licence from the College there, against the statute and their charter; for which [ 343 ] he demanded 5l. for every month; being the penalty given by the statute; the defendant pleaded the statute 34 H. 8. which enables every one to practise physick or surgery, being lawful therein, notwithstanding any act to the contrary. The plaintiff replies and shews the plaintiff's Mar. cap. 9. which confirms their charter, and every article thereof to stand in force; any act, statute, law, or custom to the contrary notwithstanding. Hereupon the defendant demurred;

demurred; 1<sup>st</sup>, Because this general clause in this law doth not restrain the statute of 34 H. 8. 2<sup>dly</sup>, That this pleading is a departure: for it ought to have been shewn before. It was argued for the plaintiff, 1<sup>st</sup>, That the act of 34 H. 8. is repealed by the 1 Mar. quoad the College of Physicians in London, as fully as if it had been by express words recited and repealed. For when it confirms the charter of 14 H. 8. and appoints, that it, and every part thereof shall stand and be available, the statute of 34 H. 8. cannot stand with it, quia *leges posteriores leges priores contrarias abrogant*, 4 Ed. 4. *PORTEK'S CASE*, Co. 1. fol. 25. b. 2<sup>dly</sup>, That it is not any departure; because there is not any new matter, but matter pleaded in reviving of the former or fortification thereof, and a record was shewn. Mich. 10 & 11 Eliz. betwixt *BOWELINS v. . . . .* where the record was in the same manner as this record is; and there the plaintiff had judgment: Wherefore &c. and there being none on the defendants part to argue; the Court, upon hearing the record, gave rule that judgment should be entered for the plaintiff, unless &c. Cro. J. 124. Trin. 4 Jac. B. R. *Doctor Laughton v. Gardener*.

8. 5, 6. And if the warden of the grocers (that is of the apothecaries company) shall neglect to go with the president, or four physicians elected, according to the said statute of 32 H. 8. to search for faulty drugs when required so to do, that then the said physicians may search and punish the said apothecaries for any faulty drugs without the said assistance of the said wardens; and every person, who shall resist such search, shall forfeit 10l. And all justices of peace, mayors, sheriffs, bailiffs, and constables, and other officers within the said city and precincts, are required to assist the said president and college, and all persons authorized by them, to put the abovesaid statutes in execution, upon pain of incurring a contempt.

8. A judgment in debt was obtained upon the statute 14 H. 8. by Doctor Laughton, President of the College of Physicians in London, who died before execution had, and thereupon the successor brought a *scire facias* to have execution; it was thereupon demurred, because the *scire facias* ought to be brought by the executor or administrator of him who recovered, and not by the successor; but upon hearing of the record, without argument, the Court held, that the successor might well maintain the action, for the suit is given to the College by a private statute; and the suit is to be brought by the President for the time being; and he having recovered in right of the corporation, the law shall transfer that duty to the successor of him who recovered, and not to his executors, the action being brought, for that he practised physick in London without licence of the College of Physicians, against the statute of 14 H. 8. Wherefore it was adjudged for the plaintiff. Cro. J. 159, 160. Pasch. 5 Jac. B. R. *Doctor Atkins v. Gardener*.

9. An action brought in the name of the President alone is not good; per Coke Ch. J. and Doderidge J. against Haughton J. 2 Bulf. 185, 186. Hill. 11 Jac. the College of Physicians v. Doctor Tenant.

only should bring the action, said, that that had been frequently over-ruled. 2 Show. 166. pl. 158. Mich. 33 Car. 2. B. R. *President and College of Physicians v. . . . .*—Debt was brought in the name of the President and College of Physicians, on the statute of 14 H. 8. cap. 15. for the penalty of 5l. per month for practising physick in London without licence; and upon demurrer to the declaration, this exception among others was taken, that the action ought to be brought in the name of the College only, or the President only, the words of the patent being, *Quod ipsi per nomina presidentis collegii, seu communitatis facultatis medicinae, London, should sue and be sued*. To this it was answered, that they are incorporated by the name of President and College, and have in consequence of that a power to sue and be sued by that name, and this power is not taken away by the additional affirmative power which is farther given to them. And judgment was given for the plaintiff. 2 Saik. 451. Trin. 13 W. 3. B. R. *The President and College*

Brownl.  
93. S. C. —  
Nov. 121.  
S. C.

Pemberton  
Ch. J. in  
answer to an  
objection  
that the  
President

of Physicians of London v. Salmon. — The action was brought by the name of *President and College or Community of the Faculty of Physick in London*, for practising physick without licence, *Per quod actio accrevit Domino Regi & Dom. Regina & eidem Presidenti qui tam pro Collegio & Communitate &c.* Holt Ch. J. said, This is the best way of declaring, especially since the penalty is given to the corporation; sed adjournatur. 5 Mod. 327. Hill. 8 W. 3. College of Physicians v. Salmon.

[ 344 ]  
Id. 261. S.  
C. by the  
name of the  
College of  
Physicians  
v. Butler.

10. Debt was brought upon the statute of 14 H. 8. 5. for practising physick within seven miles of London without licence &c. The defendant *pleaded the statute of 34 H. 8. cap. 8. and that he having skill in the nature of herbs, roots, &c. by speculation and practice, applied to persons requiring his skill, herbs, ointments &c. to their sores &c. and to all other diseases in the said statute mentioned, prout ei bene licuit*, and as to any other practice Not guilty: et de hoc ponit &c. et hoc paratus est verificare. The plaintiff replies, and *shews the statute 1 Mar. 9. which confirms the charter of 10 H. 8. and the statute 14 H. 8. and appoints that it shall be in force notwithstanding any statute or ordinance to the contrary*. Hereupon the question was, whether the 34 H. 8. be repealed by the 1 Mar. 9. by reason of the general words, any act &c. to the contrary &c? Richardson Ch. J. conceived it was; but Croke J. conceived, that the 34 H. 8. related to surgeons, and their applying outward medicines to outward sores and diseases, and drinks only for the stone, strangullion, and ague, and that that statute was never intended to be taken away by 1 Mar. 9. But to this point Jones and Whitlock J. would not deliver their opinions; but admitting the statute of 34 H. 8. to be in force, yet they all resolv'd that the defendant's plea was ill; for in his pleading, that he apply'd herbs, ointments &c. to their sores &c. he *leaves out the principal word* in the statute, viz. (*externis*) and does not shew that he ministr'd potions for the stone, strangullion, or ague, as the statute appoints to these three diseases only and no other, so that by this plea his potions might be ministr'd to any other sickness, and for this cause affirmed the judgment. Cro. C. 256. Trin. 8 Car. B. R. Butler v. the College of Physicians.

11. An action was brought in C. B. upon the statute 3 H. 8. for practising physick without licence, and judgment given; and error was brought in B. R. because the judgment was wholly given for the President, whereas it should have been given part for the President and part for the King; in maintenance of the judgment it was answered, that the judgment is to be given for the party who brings the action, and if the action had been brought by the King only, judgment should have been given for him only, yet the money recovered shall be distributed as the statute directs. Roll Ch. J. said, the case is not alike where the King brings the action, and where the informer brings it; for the King may receive all the money, and the informer may have his part by petition to the King, and the King may if he will *sue alone* and have judgment for all, if *the King begins his suit before the informer*, but if he begins it afterwards the informer shall have his part; and if

the

the King do inform tam pro seipso as for the College, there the College shall have its part; per Roll Ch. J. Sti. 329. Trin. 1652: Dr. Trigg v. the College of Physicians.

12. A copy of the statute for not administering physick within London not being of the College &c. was produced by defendant, and sworn to be a true copy taken out of the Rolls Chapel, and no *Le Roy veult* in it; and it was alledged, that Cardinal *Wolsey* had a great sum of money to foist it in among others; but per Pemberton Ch. J. there were several forms of statutes in ages past, and this has been allowed an act of parliament so often, and in so many cases, that he would not dispute it now. 2 Show. 166. Mich. 33. Car. 2. B. R. President and College of Physicians v. . . . .

13. *Debt* was brought upon 14 H. 8. 5. for practising physick in Westminster for so many months; the defendant pleaded the letters patents of K. Ch. 2. giving free liberty to French protestants to exercise the faculty of physick in London and Westminster &c. and that he was a French protestant &c. Upon a demurrer the plea was held ill: but then an exception was taken to the declaration, which sets forth, that the defendant practised physick in Westminster, but does not say that Westminster is within seven miles of London; and for that reason the defendant had judgment. 4 Mod. 47. Mich. 3 W. & M. B. R. College of Physicians v. Butti.

S. C. cited  
5 Mod. 328  
in the Case  
of the Col-  
lege of  
[ 345 ]  
PHYSICI-  
ANS v.  
SALMON,  
and said,  
that it was  
brought by  
the name of  
President,  
College, or  
that Case.

Community &c. and held naught; but Holt Ch. J. said there was no judgment in that Case.

14. Holt Ch. J. said, It seemed to him that the *Censors* may tender an oath as a necessary consequence of their judicial power; but said he would give no positive opinion; and tho' a person be not one of the College, yet if he practise physick within their jurisdiction, he ought to subject himself to the law as well as any other. 12 Mod. 393. Pasch. 12 W. 3. in delivering the judgment of the Court in the Case of Dr. Grenville v. College of Physicians.

15. The *Censors* of the College of Physicians in London are impowered to inspect, govern, and censure all practisers of physick in civitate London and seven miles round, so as to punish by fine, amerciamment, and imprisonment. Per Holt Ch. J. The *Censors* have a judicial power; for a power to examine, convict, and punish is judicial, and they are Judges of Record because they can fine and imprison; and being Judges of the matter, what they have adjudged is not traversable. 1 Salk. 396. Trin. 12 W. 3. B. R. Groenvelt v. Burwell.

12 Mod.  
386. S. C.  
— Carth.  
492. S. C.—  
But tho' the  
pills and  
medicines  
were really  
salubres pil-  
lule & bona  
medica-  
menta, yet

no action lies against the *Censors*; because it is a wrong judgment in a matter within the limits of their jurisdiction, and a Judge is not answerable, either to the King or the party, for the mistakes or errors of his judgment, in a matter of which he has jurisdiction: it would expose the justice of the nation, and no man would execute the office, upon peril of being arraigned by action or indictment for every judgment he pronounces. 1 Salk. 397. Trin. 12 Will. 3. B. R. Groenvelt v. Burwell & al.

16. Since the statute of H. 8. of Confirmation of the Charter of the College of Physicians, none can practise physick in London, or within 7 miles round it, without a licence from the

College, and the exception therein does not qualify the prohibitory clause in it, but only orders, that in all parts of England a practitioner of physick must either have a licence from the College, or be a graduate in either of the universities; and this was the scope of the statute in few words; per Holt Ch. J. 12 Mod. 602. at Nisi Prius. Mich. 13 W. 3. Anon.

17. 10 Geo. 1. cap. 20. Recites former acts. And

S. 1, 2. Impowers the Censors &c. to search the houses of any persons keeping medicines, drugs &c. and to destroy all such as are defective, corrupted or decay'd; except drugs in the houses or warehouses of merchants &c. not making or keeping medicines for sale.

S. 3. Gives liberty to the apothecaries to appeal to the College.

S. 4. Inflicts a penalty of 10l. on persons hindering a search.

S. 6. Patentees for sole making &c. any medicine are not to be prejudiced hereby.

S. 7. Where any person is condemned by the Censors for not well executing, practising, or using the faculty of physick, he may within 14 days after notice appeal to the College, and the judgment given on such appeal shall be final.

S. 8. enacts, That this act, and the acts of 14 and 15 H. 8. cap. 5. and 32 H. 8. cap. 40. and 1 Mar. Sess. 2. cap. 9. be deemed publick acts.

[For more of Physicians and Surgeons in general, see Recusant, and other proper Titles.]

This act was to be in force for three years, and to the end of the next session of parliament.

(A) Pirate or Piracy. *What. Who. And how considered.*

1. A *Pirate* is now taken for one who maintains himself by pillage and robbing at sea; but in former times the word was used in a better sense, being attributed to such person to whose care the mole or peer of a haven was intrusted; and sometimes for a sea soldier. After Menevens Epist. in vit. *Ælfredi*.—Rex *Ælfredus* jussit cymbas & galeas, i. e. longas naves fabricari per regnum, ut navali prelio hostibus adventantibus obviret; impositisque piratis in illis vias maris custodiendas commisit. Cowel's Interp. verbo *Pirata*.

2. A

2. A Norman was captain of an English ship who had English people with him, and robbed people upon the sea, and was taken and found guilty; and because he did it in the Norman language, it was accounted only felony against him, and he was hang'd: and against the English it was adjudg'd treason, because they did it in the English language; and they were drawn and hang'd. Br. Treason, pl. 16. cites 40 Aff. 25. that it was said by Fitzjohn to have been before Shard; quod non negatur.

Br. Corone,  
pl. 118.  
cites S. C.  
—Staunf.  
Pl. C. cap.  
1. fo. 10.  
b. 11. cites  
S. C.—  
11 Rep. 53.  
54. Trin.  
7 Jac. in the  
Cafe of the

Admiralty, cites S. C. —Hawk. Pl. C. 87. cap. 32. f. 1. and 98. cap. 37. f. 2. cites S. C. —Before the statute of 25 E. 3. if a subject had committed piracy upon another (for so is the book to be intended upon a fact done before 25 E. 3.) this was holden to be petit treason, for which he was to be drawn and hang'd; because pirata est *\* hostis humani generis*, and it was *contra ligeancia sua debitum*: but if an alien, as one of the Normans who had revolted in the reign of King John, had committed piracy upon a subject, this offence could be no treason; for tho' he were *hostis humani generis*, yet the crime was not *contra ligeancia sua debitum*, because the offender was no subject; but since the statute of 25 E. 3. this is no treason in the case of a subject. 3 Inst. 113.

\* If piracy be committed on the ocean, and the pirates in the attempt there happen to overcome, the captors are not obliged to bring them to any port, but may expose them immediately to punishment, and hang them up at the main-yard end before a departure; for the old natural liberty remains in places where are no judgment. Molloy 61. cap. 4. f. 12. —And therefore at this day, if a ship shall be on a voyage to the West-Indies, or on discovery of those parts of the unknown world, and in her way be assaulted by a pirate, but in the attempt overcomes the pirate; by the Laws Marine, the vessel is become the captors; and they may execute such beasts of prey immediately, without any solemnity of condemnation. So likewise, if a ship be assaulted by pirates, and in the attempt the pirates shall be overcome, if the captors bring them to the next port, and the Judge openly rejects the trial, or the captors cannot wait for the Judge without certain peril and loss, justice may be done upon them by the Law of Nature, and the same may be there executed by the captors. Molloy 61. cap. 4. f. 13.

3. 28 H. 8. cap. 15. f. 4. This act shall not extend to any person for taking any victual, cables, ropes, anchors or sails, which such person (compelled by necessity) taketh of any ship which may spare the same, so the person pay for the same money or monies worth, or deliver a bill obligatory to be paid, if the taking be on this side the Straits of \* Morroke, to be paid within four months; and if it be beyond the said Straits, to be paid within twelve months; and that the makers of such bills pay the same at the day limited.

\* Morocco.  
Molloy 65.  
cap. 4. f. 20.

4. A man cannot be hanged for piracy for a robbery done on the Thames, for this is *infra corpus comitatus*; per Coke and Doderidge. Roll. R. 175. Pasch. 13 Jac. B. R. Palachie's Cafe.

S. C. cited.  
3 Bull. 28.  
—If a pirate  
enters into a  
port or ha-  
ven of this

kingdom, and a merchant being at anchor there, the pirate assaults him and robs him, this is not piracy, because the same is not done *super altum mare*, for that the act is *infra corpus comitatus*, and was iniquitable and punishable by the common law, before the statute of 28 H. 6. cap. 15. Molloy 69. cap. 4. f. 27.

5. If a pirate attacks a ship, and only takes away some of the men in order to the selling them for slaves, this is piracy by the law marine; but if a man takes away a villain or ward, or any other subject, and sells them for slaves, yet this is no robbery by the common law. Molloy 63. cap. 4. f. 16. [ 347 ]

6. If a pirate shall attack a ship, and the master for the redemption shall give his oath to pay a sum certain; though there be no taking, yet is the same piracy by the law marine; but by the common law there must be an actual taking, though it be but

but to the value of a penny, as to a robbery on the highway, Molloy 64. cap. 4. f. 18.

7. If a ship shall ride at anchor, and the mariners shall be part in their ship-boat and the rest on the shore, and none shall be in the ship; yet if a pirate shall attack her and rob her, the same is piracy. *Ibid.*

8. It was resolved by all the Judges, and the rest of the commissioners then present, that his Majesty having granted *letters of reprisal* to Sir Edmond Turner and George Carew against the subjects of the States General of the United Provinces, and that afterwards that grant was called in by proclamation, and afterwards superseded under the Great Seal; that Carew [without Turner] having deputed several to put in execution the said commission, who accordingly did; and being indicted for piracy, the same was not a felonious and a piratical spoilation in them, but a caption in order to an adjudication; and tho' the authority was deficient, yet not being done by the captain and his mariners, *animo depradandi*, they were acquitted. Molloy 71. cap. 4. f. 33.

This act is made perpetual by 6 Geo. 1. cap. 19.

9. 11 & 12 W. 3. cap. 7. f. 7. If any of his Majesty's subjects shall commit piracy or robbery, or any act of hostility, against others his Majesty's subjects upon the sea under colour of any commission from any foreign state, or authority from any person whatsoever, such offenders, and every of them, shall be adjudged pirates, felons, and robbers; and being convicted according to this act, or 28 H. 8. cap. 15. shall suffer pains of death, and loss of lands and goods.

8. If any commander of any ship, or any mariner, shall, in any place where the admiral hath jurisdiction, betray his trust, and turn pirate, enemy, or rebel, and piratically and feloniously run away with the ship, or any boat, ordnance, ammunition, or goods, or yield them up voluntarily to any pirate, or shall bring any seducing messages from any pirate, enemy or rebel, or consult or confederate with, or attempt to corrupt any commander, officer, or mariner, to yield up or run away with any ship or goods, or turn pirate, or go over to pirates, or if any person should lay violent hands on his commander to hinder him from fighting in defence of his ship and goods, or confine his master, or endeavour to make a revolt in the ship, he shall be adjudged a pirate, felon, and robber, and being convicted according to this act shall suffer death, and loss of lands and goods.

This act is made perpetual by 2 Geo. 2. cap. 28.

10. 8 Geo. 1. cap. 24. f. 1. If any commander of any ship, or other person, shall trade with any pirate, or shall furnish any pirate, felon, or robber, on the seas, with ammunition, provisions, or stores, or shall fit out any ship knowingly and with design to trade or correspond with any pirate &c. or if any person shall consult, combine, or correspond with any pirate &c. knowing him to be guilty of any piracy, felony, or robbery, such offender shall be adjudged guilty of piracy, felony, and robbery, and shall be tried according to the statutes 28 H. 8. cap. 15. & 11 & 12 Will. 3. cap. 7. and being convicted shall suffer death, and loss of lands and goods; and if any person be-  
longing

*longing to any ship, upon meeting any merchant-ship on the high-seas, or in any port, haven, or creek, shall forcibly board and enter such ship, and though they do not seize and carry her off, shall throw over-board or destroy any of the goods, they shall be punished as pirates.*

S. 10. *This act shall extend to all his Majesty's dominions in Asia, Africa, and America, and shall be a publick act, and shall continue 7 years &c.*

11. An indictment was against a master of a ship for piratically burning his ship. The case was, viz. A ship was laden with linnen at Rotterdam, and bound for Malaga in Spain, and when the defendant received the bill of lading, he was ordered by the merchants and owners to put in at Lynn Regis in Norfolk, in order to get a Mediterranean pass for his safety; and when he came near Dartmouth-bay, it was proved by one witness (who was the carpenter of the ship), *that the defendant tamper'd with him, to know what he would take to knock the ship in the head; and it was proved by another witness, that the defendant gave the ship's crew some bowls of punch on that day the ship was burnt, and made them all drunk; and afterwards order'd this witness to make a fire in the cabin, where there was none for a month before that time; which he did when the defendant and most of the crew were going ashore, except two that were very drunk; and that there was but one bucket belonging to the ship, which the defendant had ordered a sailor to fling overboard the day before the ship was burnt. The two sailors who remained drunk in the ship, made oath, that they were sleeping there till the ship was so much on fire, that they could not relieve her nor themselves, but that they were carried off by another ship's boat then in the harbour. Upon this evidence the presumption was very strong, and the ship was burnt by that fire which was first made in the cabin; but this being only presumption, and no direct proof, the defendant was acquitted. 8 Mod. 74. Pasch. 8 Geo. 1. The King v. Mason.* [ 348 ]

12. He was afterwards tried upon another indictment for piracy, in *stealing the goods* which he had at Rotterdam on ship-board, and consigned to such a place, viz. to Malaga; and the evidence against him was, *that the goods were delivered to him, and that afterwards he got both the ship and cargo insured at London and Rotterdam; and when he came to the coasts of England, he privately run all the goods, and when the ship happened to be burnt, he came to Dartmouth and protested both ship and cargo as burnt and lost* (according to the method of protesting insured ships), tho' the cargo was privately run by him as before-mentioned, which was proved by several witnesses. To prove the delivery of the goods to him, an exemplification of the entry thereof was offer'd in evidence, which entry was made in the custom-house books at Rotterdam, and attested by a public notary, and sealed with the public seal there; but the Court would not admit this exemplification to be given in evidence,

dence, thereupon the owner of the goods proved the property and the delivery &c. 8 Mod. 75. The King v. Mason.

It is not piracy unless the same fact done upon land had been felony. Roll. R. 175. Pasch. 13 Jac. B. R. Palachie's Case.

13. The counsel for the King against the defendant laid down this for a rule, viz. that *all acts which amount to felony at land*, the same would amount to piracy at sea; that upon this evidence it plainly appear'd, that the defendant had *run the goods animo furandi*, which if done at land would be felony; as for instance, if goods are delivered to a carrier, and he steals them *animo furandi*, it is felony, and so is this piracy; for it appears, by his protesting that the ship and cargo was burnt and lost, that he designed to cheat both the owners and insurers. 8 Mod. 75. King v. Mason.

14. It is true, if a *master* of a ship *runs goods* with an intention to cheat the King of the duties, this is no piracy, tho' the goods should happen to be *seised as forfeited to the crown for not paying the duties*. But here, by the defendant's *protesting the goods to be lost when they were not*, but privately run by him, this *must be with an intention to cheat and defraud the owners*, for it was done *animo furandi*, and his intention makes it piracy, as a felonious intent makes the action felony. The defendant produced an instrument in writing under the merchant's hand, who freighted the ship (as he pretended), by which he had authority to run the goods as he should find opportunity: but upon inquiry and proof this seemed to be a forgery, for the merchant on oath denied his signing the instrument; and the witness to it being now produced to prove the signing, made [ 349 ] oath, that he did not know the merchant therein mentioned, but that the defendant and another were at a publick house in Rotterdam, and sent for this witness, who came, and then the defendant told him, that the other person there present was his merchant, and that he sent for him to be a witness to the power his merchant gave him; and thereupon the instrument being ready drawn, that other person signed it, and this witness attested it; all which gave room for a presumption that he intended the running the goods, before he left Holland, *animo furandi*; but notwithstanding, the Judge of the common law, who assisted the Judge of the admiralty, directed the jury to acquit the defendant, *for that the goods were delivered to him upon a special trust to deliver them at Malaga*, and that it could be no piracy to convert those goods in a fraudulent manner until that special trust was determined, no more than it could be felony in a carrier by converting of goods delivered to him to carry to such a place before that special trust was determined; and this appears to be the law of England by concurrent resolutions in several law-books. 8 Mod. 75, 76. The King v. Mason.

If a bale or pack of merchandise be delivered to a master to carry over

15. Thereupon the counsel for the King insisted, that tho' this was not piracy before the special trust was determined, yet the *breaking open some bales of linnen on board this ship* made it piracy, for this was a conversion *with force & animo furandi*; and that it would be felony in a carrier to break open any boxes

boxes delivered to him, and to convert them *animo furandi*, for such a conversion by force is felony, though the special trust was not determined; but the Court held there was a difference between opening of bales of linnen, and breaking open locks or nails of boxes by a carrier, and that this was no piracy; whereupon the jury acquitted the defendant of this indictment. 8 Mod. 76, 77. The King v. Mason.

*the same, the same is no felony. But if he opens the bale or pack, and takes any thing out animo furandi, the same may amount to such a larceny as he may be indicted in the Admiralty, tho' it amounts not to a piracy. Yet if such a matter of ship shall carry the lading to the port appointed, and after he retakes the whole pack or bale back again, this may amount to a piracy; for he being in nature of a common carrier, the delivery had taken its effect, and the privacy of the bailment is determined.* Molloy 63, 64. cap. 4. l. 17.

16. (And he was afterwards tried upon a third indictment for a cheat in committing the acts aforesaid, and was found guilty and fined, and imprisoned till he paid the fine. 8 Mod. 77. The King v. Mason.)

### (B) What is forfeited, &c.

1. Patentee of pirate's goods shall pay no custom; for as they are goods given by law to the King, there is no reason he should have custom for his own goods. Lane 15. Hill. 4 Jac. Anon.

2. By the grant of *bona piratarum*, he shall not have goods which the pirates had stolen from others, but only their own proper goods, and the owners of the rest shall have their goods restored to them again if they come for them; but if they come not, then they are to be forfeited to the King; per Coke Ch. J. who says this was the opinion of all the Judges. 3 Bullf. 148. Mich. 13 Jac. Princeton's Case.

3. Pirate ought to be attained of piracy before the forfeiture of his own proper goods; per Coke Ch. J. ut sup. 3 Bullf. 148.

where the owner is not known. Jenk. 325. pl. 40. — The goods taken from others the King cannot grant; for it appears by the statute 27 E. 3. St. 2. cap. 8. that the merchant so robbed shall be received to prove that the goods or chattels belong to him by his chart or cockpit, or by other lawful proof of merchants &c. and then the said goods shall be delivered without any suit at the common law, which act is general, be the robber privy or a stranger. But it was resolved, that until such proof be made the King may seize the said goods; for goods of which the property is unknown, the King may seize. And if they are *bona peritura*, the King may sell them, and upon proof restore the value. And note, The statute does not limit the owner to any certain time to prove the property of the goods in such case of depredation. 12 Rep. 73. Trin. 8 Jac.

Roll. R. 285. Hildebrand, Brimston and Baker's Case S. C. — Molloy 66. cap. 4. f. 23. cites S. C. — The King shall have the piratical goods

4. A ship belonging to merchants is not forfeited for the piracy of the crew that were in it. Per Doderidge and Coke. Roll R. 285. Hill. 13 Jac. B. R. Hildebrand's Case.

5. 8 Geo. 1. cap. 24. f. 2. enacts, That every ship fitted out with a design to trade or correspond with any pirate, and all the merchandizes put on board the same, with an intent to trade with any pirate, shall be forfeited, one moiety to the King, the other to the first

*first discoverer of such design, who may sue for the said ship &c. in the High Court of Admiralty.*

### (C) *Property alter'd. In what Cases.*

1. *England, Denmark and Spain* are in amity with one another; a *Dane robs a Spaniard* upon the seas; the *goods are sold in England*. They shall be restored to the Spaniard, because of these amities. Per omnes Justiciarios Angliæ. Jenk. 165. pl. 17. cites 2 R. 3. 2.

S. P. And the owners are for ever concluded, and if they

2. *Buying in market overt without fraud* goods taken by pirates piratically will defend the buyer. Resolved. Hob. 79. pl. 103. Don Diego d'Acuna v. Joliff & al.

should go about in the *Admiralty* to question the property, in order to restitution, they will be prohibited. Molloy 66. cap. 4. f. 23.

If an English merchant buys goods of a pirate, the owner may have remedy against the buyer. Per Doderidge J. 3 Bullst. 29. Pasch. 13 Jac. B. R. in Case of the King v. Marsh.—[But nothing is mentioned by Doderidge of market overt.]—And Trin. 41 Eliz. C. B. it was resolved by all the Court, that goods so taken being sold upon the land, unless it be in a market overt, doth not alter the property. Cro. E. 635. pl. 20. Anon.

Vent. 308. Anon. S. P. obiter contrary to Hob. 78. Spanish Ambassa-

3. Goods are \* taken by pirates, yet this does \* not change the property; tho' if goods are taken by an enemy, and retaken by an Englishman, it is otherwise. Vent. 174. Mich. 23 Car. 2. B. R. in the Case of Radley v. Eglesfield.

—2 Lev. 25. S. C. —\* S. P. Resolv'd. Godb. 193. Trin. 10 Jac. C. B. Greenway v. Baker. —Cro. E. 685. pl. 20. Trin. 41 Eliz. S. P. adjudged in an Anonymous Case.

By the Stat. of 27 E. 3. cap. 13. If a merchant lose his goods at sea by piracy or tempest (not being wreckt), and they afterwards came to land; if he can make proof they are his goods, they shall be restored to him in places guildable by the King's officers and six men of the country; and in other places by the Lords there and their officers, and six men of the country. Molloy 65. cap. 4. f. 22. —This law hath a very near relation to that of the Romans, called De usu-captione, or the Atinian law; for Atinius enacted, that the plea of prescription or long possession should not avail in things that had been stolen, but the interest which the right owners had should remain perpetual: the words of the law are these, Quod surreptum est, ejus rei æterna auctoritas esset, where by (auctoritas) is meant jus dominii. Ibid.

See 10 Mod. 79. S. P.

4. In all cases where a ship is taken by letters of marque or piracy, if the same is not carried *infra præsidia* of that prince or state by whose subject the same was taken, the owners are not divested of their property, but may recieve wheresoever they meet with their vessels. Molloy 62. 63. cap. 4. f. 15.

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### (D) *Punishment of Piracy.*

1. 28 H. 8. cap. 15. f. 3. *ENacts*, That for treasons, robberies, felonies, murders and confederacies done upon the sea, or in any place rehearsed in this statute, the offenders shall not have benefit of clergy.

2. Clergy

2. *Clergy is not allowable* upon arraignment for piracy upon the Statute 28 H. 8. unless the piracy was done in a creek or other river in which the common law before the statute had jurisdiction, nor if 'twas done *in alto mari*, and out of the body of the county; because such felony is not felony by our law, but by the civil law, in which no clergy was accustomed to be allowed. And the statute 28 H. 8. does not make it felony, but only ordains how it shall be tried; and says, see the Statute of E. 6. which takes away and gives clergy, and yet it does not extend to this act of 28 H. 8. nor to this felony of piracy done *super altum mare*. 2. By the † *King's pardon of all felonies by common law, or by any statute*, it is not pardoned; because it is neither felony by the common law nor statute, if it be *super altum mare*: but otherwise, if it be committed in a creek or port. Resolved by all the Justices. 2 Jac. Feb. 14. Mo. 756. pl. 1044. in a Case of Pirates.

\* Moll. 69. cap. 4. f. 28. — The case was, Divers did in the reign of the late Queen Eliz. commit piracy and robbery upon the high sea of divers merchants of Venice in amity with the said Queen, and after the pirates, being not known, obtained a

pardon, granted at the coronation of King James, whereby the King pardoned them all felonies (inter alia). Resolv'd, 1st. That before this statute piracy or robbery on the high sea was no felony whereof the common law took any knowledge, for that it could not be tried, being out of all towns and counties, but was only punishable by the civil law, as by the preamble it appeareth; the attainder by which law wrought no forfeiture of lands, or corruption of blood. 2dly. That this statute did † *not alter the offence*, or make the offence felony, but leaveth the offence as it was before this act, viz. felony only by the civil law, but giveth a means of trial by the common law, and inflicteth such pains of death as if they had been attainted of any felony &c. done upon the land. But yet (as hath been said) the offence is not altered; for in the indictment upon this statute, the offence must be alledged upon the sea; so as this act inflicteth punishment for that which is a felony by the civil law, and no felony whereof the common law taketh knowledge. 3dly. Although the King may pardon this offence, yet being no felony in the eye of the law of the realm, but only by the civil law, the † *pardon of all felonies generally* extendeth not to it, for this is a special offence, and ought to be especially mentioned. 3 Inst. 112. — Upon this resolution these consequents do follow: 1st. That by the attainder upon this act, though there be forfeiture of lands and goods, yet there is † *no corruption of blood*. 2. Seeing the offence is not made felony by the laws of this realm, there can be † *no accessory* of any felony by the laws of this realm in this case, either before or after the offence, because the principal is no felon by our law, neither doth this act speak of any accessory. 3. If there be an † *accessory* upon the sea to a piracy, that accessory may be punished by the civil law before the Lord Admiral, but cannot be punished by this act, because it extendeth not to accessories, nor makes the offence felony. Lastly, The statute of 35 H. 8. cap. 2. taketh not away this statute for treasons done upon the sea for the cause aforesaid. 3 Inst. 112. — † Mollay 68. cap. 4. f. 25. — Hawk. Pl. C. 99. cap. 37. f. 6. — † Mollay 70. cap. 4. f. 28. — † Mollay 69. cap. 4. f. 26. & 70. f. 29. — Hawk. Pl. C. 99. cap. 37. f. 8. cites S. C. — † But see Statute 11 & 12 W. 3. cap. 7. f. 9. at (E). — Mollay 61. cap. 4. f. 25 — Hawk. Pl. C. 99. cap. 37. f. 8. cites S. C. — † S. P. Mollay 70. cap. 4. f. 29. — \* Hawk. Pl. C. 99. cap. 37. f. 6. cites S. C.

3. The words of the statute of 28 H. 8. are, *That a commission shall be directed &c. to hear and determine such offences after the course of the laws of the land &c.* So that if the offender, upon his arraignment before commissioners by force of this statute, stand mute, he shall have judgment de peyne fort & dure, by force of this general branch; but it is out of the latter words of the act, viz. *And such as shall be convict of any such offence by verdict, confession or process*; for he that standeth mute, is not convict of the offence, but suffereth for his contumacy. Also it is neither by verdict, confession or process. 3 Inst. 114.

Hawk. Pl. C. 99. cap. 37. f. 9. S. P. and cites S. C. and such punishment was inflicted on a pirate that stood mute. D. 241. b. pl. 49. Mich. 7 & 8 Eliz. Anno.

4. Anciently, when any merchants are robbed at sea, or spoiled of their goods, the King usually issued out *commissions under*

*under the Great Seal of England, to inquire of such depredations and robberies, and to punish \* the parties; and for frauds in contracts, to give damages to the parties, and proceed therein secundum legem & consuetudinem Angliæ, secundum legem mercatoriam, & legem maritimam; all three laws included in the commissions. Molloy 71. cap. 4. f. 32.*

*5. By 8 Geo. 1. cap. 24. f. 1. Persons declared pirates thereby, and being convicted, shall suffer death, and loss of lands and goods.*

*S. 4. Every offender convicted of any piracy, felony or robbery, by virtue of this act is excluded the benefit of clergy.*

### (E) Accessories punished. How.

1. **I**F a pirate at sea assault a ship, but by force is prevented entering her, and in the attempt the pirate slays a person in the other ship, they are all principals in such a murder, if the Common Law hath jurisdiction of the cause: but by the Law Marine, if the parties are known, they who gave the wound only shall be principals, and the rest accessories; and where they have cognizance of the principal, the Courts at common law will send them their accessory, if he comes before them. Molloy 62. cap. 4. f. 14.

2. 11 & 12 W. 3. cap. 7. f. 9. enacts, That all persons who shall either on land or upon the seas knowingly set forth any pirate, or assist or maintain, procure, command, counsel or advise any person to commit any piracies or robberies upon the seas; and such person shall thereupon commit any such piracy or robbery, all such persons shall be adjudged accessory to such piracy and robbery; and after any piracy or robbery committed, every person who knowing that such pirate or robber has committed such robbery, shall on the land or upon the sea receive, entertain or conceal any such pirate or robber, or receive any ship or goods by such pirate or robber piratically and feloniously taken, shall be adjudged accessory to such piracy and robbery; and all such accessories may be inquired of, heard and determined after the common course of the law, according to the statute 28 H. 8. cap. 15. as the principals of such piracies and robberies ought to be; and being attainted, shall suffer death, and loss of lands and goods.

3. 8 Geo. 1. cap. 24. f. 3. enacts, That all persons who by the act 11 & 12 W. 3. cap. 7. are declared accessories to any piracy, are hereby declared principal pirates.

### (F) Rewards for opposing or discovering Pirates.

1. 11 & 12 W. 3. **E**NACTS, That when any English ship shall have been defended against pirates, enemies or sea-rovers by fight, and brought to her port, in which fight any of the officers or seamen shall have been killed or wounded, it shall be lawful for the Judge of his Majesty's High Court of Admiralty, or his surrogate

Magistrate in the port of London, or the mayor, bailiff or chief officer in the several outports of this kingdom, upon petition of the master or seamen of such ship, to call unto him four or more substantial merchants, and such as are no adventurers or owners of the ship or goods, and have no interest therein, and by advice with them, to raise upon the adventurers and owners of the ship and goods, by process out of the said Court, such sums of money as himself and the said merchants by plurality of voices shall judge reasonable, not exceeding 2 per cent. of the freight, and of the ship and goods according to the first costs of the goods, which money shall be distributed among the captain, master, officers and seamen of the ship, or widows and children of the slain, according to the direction of the Judge of the said Court &c. with the approbation of the merchants aforesaid, who shall proportion the same to the ship's company, having special regard to the widows and children of such as shall have been slain, and such as have been wounded.

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S. 11. A reward of 10l. for every vessel of 100 tons or under, and 15 l. for every ship of a greater burden, shall be paid by the commander of every ship wherein any combination shall be set on foot for the running away with or destroying such ship, or the goods therein, to such person as shall first make a discovery thereof; the same to be paid at the port where the wages of the seamen are to be paid.

S. 12. This act shall be in force for 7 years &c.—But is made perpetual by 6 Geo. 1. cap. 19.

2. 8 Geo. 1. cap. 24. s. 5. enacts, That if any seaman or mariner on board any merchant-ship or vessel shall be maimed in fight against any pirate, every such seaman &c. upon due proof of his being maimed in such fight, shall not only have and receive the rewards already appointed by 22 and 23 Car. 2. cap. 11. but shall be admitted into and provided for in Greenwich hospital, preferable to any other seaman who is disabled from service by age.

### (G) Punishment of Sailors &c. for not opposing Pirates.

1. 8 Geo. 1. ENacts, That if any commander, master, or other cap. 24. s. 6. officer, or any seaman or mariner of any merchant ship or vessel which carries guns and arms, shall not, when they are attacked by any pirate, or by any ship &c. on which any such pirate is on board, fight, and endeavour to defend themselves and their said ship, &c. from being taken by the said pirate, or shall utter any words to discourage the other mariners from defending the ship, and by reason thereof the ship &c. shall fall into the hands of such pirate, then every such commander &c. and every such seaman &c. who shall not fight and endeavour to defend and save the said ship &c. or who shall utter any such words as aforesaid, shall lose and forfeit all and every part of the wages due to him and them respectively, to the owner of the said ship &c. and shall not be permitted to sue for or recover the same

or any part thereof in any Court, either of law or equity, and also shall suffer six months imprisonment.

S. 10. This act shall continue 7 years &c.—But is made perpetual by 2 Geo. 2. cap. 28.

## (H) Pleadings &c. in Indictments.

**Hawk. Pl. 1.** IN case of piracy, the indictment, laying the offence to be *done upon the sea felonice*, is not sufficient, but it *must be pi-*  
**C. 100 cap.** *ratice* also. **Staunf. Pl. C. 114. a.**  
**37. f. 10.** It has been held,  
 That such indictment must allege the fact to be done upon the sea, and must have both the words felonice and piratice.—The indictment must mention the same to be done upon the high sea. **Molloy 68, 69. cap. 4. f. 25.**

[For more of Piracy in general, see Admiralty, Trial, and other proper Titles.]

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## Piscary.

\* There is no letter at this Title in Roll.

Per Cur. *Libera piscaria is all one with separalis piscaria, and not with communis piscaria; for libera piscaria implies an interest,*

### \* (A) [Exclusive of the Owner of the Soil.]

[1. A Man may claim *separalem piscariam* in such water, and the owner of the soil shall not fish there upon such piscary. **Co. Litt. 122.** and there cites **Mich. 29, 30 El.** between *Shirland and White*, B. and in the same Term between *Frifson and Crachrode* resolved.]

[2. But if a man claims *communiam piscariae, vel liberam piscariam*, the owner of the soil shall fish there. **Co. Litt. 122.** and there cites **M. 29, 30 El. B.** between *Shirland and White*; and in the same Term between *Frifson and Crachrode* resolved.]

and he might plead to an action of trespass for fishing in *libera piscaria sua*, that it is his *franktenement*, the which he could not plead if it was only in the nature of a common; and for this **Molt Ch. J.** cited **46 E. 3. 11.** and in the **Regiter 95.** And **F. N. B. 88. G. H.** there is a writ of *trespass quare vi & armis liberam piscariam suam piscatus est*, and such a writ is brought **17 E. 4. 6.** and therefore the **Register** and **F. N. B.** being so, and the old book of **E. 3.** agreeing with it, they did not regard the **Cases cited**, or **1 Inst. 122.** but gave judgment for the plaintiff, **Nisi. Skin. 342. Pasch. 5 W. & M. B. R. Smith v. Kemp.**

3. If one who has a several fishing grants *liberam piscariam*, the grantee has free fishing with the grantor. But if he grants *piscariam*

*piscariam suam*, without saying any thing more, the intire piscary will pass. 2 Sid. 8. Mich. 1657. B. R. Alderman of London v. Hastings.

\*(B) In what Place.

[1. M. 1. H. 5. B. R. ACTION brought for fishing in his Rot. 90. several piscary, and defendant pleads that the place where &c. is the sea where ships go, and within the jurisdiction of the admiral, and demanded judgment; and adjourned.]

\* This in Roll is (A) — See Prerogative. (B. a) pl. 14, 15. Every subject of common right may fish with lawful

nets, &c. in a navigable river as well as in the sea, and the King's grant cannot bar them thereof. But the Crown only has a right to royal fish, and the King may only grant that. 6 Mod. 73. Mich. 2 Annæ. B. R. Warren v. Matthews.—1 Salk. 357. S. C. and said a quo warranto ought to be brought to try the title of such grantee, and the validity of his grant; as where one claimed *solum piscariam in the river Ex*, by a grant from the Crown.

In replevin for taking six boat-ors the defendant avowed the taking; for that the place in question is his freehold, and that he took them damage feasant. The plaintiff pleads in bar to the avowry, that the place where, called Creswell Haven, time out of mind has been a waste ground in the township of Creswell in the parish of Woodhall; and that one Edward Coke was seized in fee of certain ancient tenements consisting of diverse messuages, and several (to wit) 200 acres of land, with the appurtenances lying in the said township; and *that he, and all those, whose &c. time out of mind have had, and of right ought to have, common of fishery in the sea there, as belonging and appurtenant to the said tenements*; and likewise a liberty of landing and putting on shore their boats upon the aforesaid place for the necessary use of their common of fishery aforesaid; and avers that he as servant to, and by command of the said Edward Coke, did fish in the sea there, and upon that occasion did put on shore his boat with the said six boat-ors, being part of the tackle thereof, in and upon the aforesaid place, as it was lawful &c. and that defendant of his own wrong took and unjustly detained them. Upon a demurrer to this plea, and several arguments, the Court held (first) that all the subjects of England may fish in the sea of common right, as appears expressly in \* 8 E. 4. 18. b. 19. pl. 30. it being for the good of the commonwealth, and for the sustenance of all the people of the realm. So is 1 Mod. 105. 6 Mod. 73. Salk. 357. Nor is it the law of this country only; for Grot. de Jure &c. lib. 2. cap. 2. sect. 3. and cap. 3. sect. 9. lays it down as the law of nations; and says the sea is as free as the air. Trin. 14 and 15 Geo. 2. C. B. Ward v. Creswell.—Secondly, The Court held, that fishing in the sea being a matter of common right, a prescription for it as appurtenant to a particular township, is void; and is as absurd as a prescription would be for travelling in the King's highway, or for the free use of the air, as appurtenant to a particular estate. Accordingly the plea in bar was held to be ill, and the avowant had judgment. Trin. 14 and 15 Geo. 2. C. B. Ward v. Creswell.—\* Br. Custom. 46, and Fish. Barre 93. S. C.

2. In case of a private river, the Lord's having the soil is a good evidence to prove that he has the right of fishing, and it puts the proof on them that claim *liberum piscariam*; but in case of a river that flows and reflows, and is an arm of the sea, there *prima facie*, it is common to all, and if any will appropriate a privilege to himself, the proof lies on his side. Per Hale Ch. J. Mod. 105. Hill. 25 and 26 Car. 2. B. R. Anon.

In the Severne there are particular restraints, as gurgites, &c. but the soil belongs to the Lord on either

side, and a special sort of fishing belongs to them likewise, but the common sort of fishing is common to all. The soil of the river Thames is in the King, and the Lord Mayor is the conservator of the river, and it is common to all fishermen, and therefore there is no such contradiction between the soil being in one, and yet the river common for all fishers &c. Per Hale Ch. J. Mod. 106. Anon.

3. A man may have a free fishery in his own soil, as he may have a river in his manor, and another may have a right of fishing there with him. Per Holt. 3 Salk. 291. Trin. 7 W. 3. B. R. Gipps v. Wolliscot.

(C) *The several Sorts of Fisheries, and what is a several Piscary.*

1. **P**iscary is three-fold, viz. *separalis*, *libera*, and *communis*. In the first case, he that has it is owner of the soil. 2. Has a property in the fish, and may bring a possessory action for them without shewing a title. 3. Is like the like case of all other commons. And 1 Inst. 122. was denied to be law. 2 Salk. 637. Trin. 4 W. & M. B. R. Smith v. Kemp.

*Separalis piscaria* is where no one else hath libertatem piscandi;

2. *Separalis piscaria* is in his own soil, and *libera piscaria* is in another's soil; per Brian; quod Littleton concessit. Br. Trespass, pl. 336. cites 17 E. 4. 6.

per Rookby J. Comb. 434. Trin. 9 W. 3. B. R. Gips v. Woolcot. — And one may have it in *alieno solo*. Ibid. 464. S. C.

3. A *stew-pond* is a man's several piscary; per the Ch. J. Vent. 123. Pasch. 23 Car. 2. B. R. in the Case of Pollexfen and Ashford v. Crispin.

(D) *Incidents.*

1. **I**N rivers, a man shall have action of *trespass* for fishing there, and if another takes fish there, he that has the water may *retake* them. Arg. Kelw. 30. pl. 2. anno 13 H. 7. Anon.

Mid. 14. pl. 38. S. C.

2. If one has piscary in any water, he has no *power to land* without the assent of the tenants of the franktenement. Savil. 11. pl. 29. 13 April, 23 Eliz. in Case of the inhabitants of Ipswich v. Brown.

3. A man, to preserve his several fishery, cannot *cut the nets and oars* of one that comes to catch his fish; but he might have taken the nets and oars, and detained them as *damage feasant*, to stop their further fishing. Cro. Car. 228. Mich. 7 Car. B. R. Reynell v. Champernoon.

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(E) *Actions and Pleadings.*

1. **T**Respass of *fish taken*, the defendant said that he is *seised in fee* of a house and eight acres of land in D. and that he and all those whose estate he has in it have had common of piscary from such a place to such a place as appendant &c. and that the place where &c. is within those bounds, by which he fish'd, as lawfully he might; and a good plea; per Choke and Danby, and it may be well appendant; and note that he alleged *appendancy and prescription*. Br. Trespass, pl. 306. cites 4 E. 4. 29.

2. Tref-

2. Trespass *quare in separali piscaria sua piscatus est*, the defendant pleaded that the place where &c. is his franktenement; and per Choke J. it is no plea but argument; but Brian contra; for by him, separalis piscaria is in his own soil, and libera piscaria is in another's soil, quod Littleton concessit. Br. Trespass, pl. 339. cites 17 E. 4. 6. and that it was adjudged a good plea per tot. Cur. 18 E. 4. 4.

S. P. Ibid.  
pl. 426.  
cites 19 H.  
7. 24.

3. Trespass of fishing in his separate piscary in D. the defendant justified by prescription in him and his predecessors time out of mind to have free fishery there; and a good plea, and good colour; but it was entered separalem piscariam according to the writ and declaration. Br. Trespass, pl. 282. cites 7 H. 7. 13.

4. In trespass quare clausum fregit the defendant justified because he said he had a right of fishing there by prescription, but does not set forth what kind of fishery he claim'd, viz. whether liberam, separalem, or communiam piscationis, or whether he has it as appertaining to a manor, mesuage &c. or not, but makes it a mere personal thing, and for that cause the plea was held naught. Per Cur. Hard. 407. Pasch. 17 Car. 2. Anon.

5. In trespass for fishing in his several piscary, and for taking 20 bushels of oysters there such a day, *continuando piscationem prædictam* from the said day to the time of the action brought. Upon Not guilty pleaded, and a verdict for the plaintiff, it was moved in arrest of judgment, that the fishing in the *continuando* was altogether incertain, not expressing the quantity or quality of the fishes, as it ought according to PLAYTER'S CASE, 5 Co. and of his opinion were Wyld and Jones. But the Ch. J. inclined to think it well enough, and said Playter's Case had not been very well approved of late years, and that is, that it is necessary to express the kind of the fishes, which has been held since needless, and he knew not why it might not be, as well as an *indebitatus assumpsit pro diversis mercimoniis*. But the other Judges said, Tho' it was reason it should be as the Chief Justice said, yet they knew not how to depart from the authorities in the point, and that Playter's Case had remained unshaken. Sed adjournatur; judgment *quod quer' nil cap. per bill'*. Vent, 329. Trin. 30 Car. 2. B. R. Hovel v. Reynolds.

2 Jo. 109.  
S. C.

6. In trespass for fishing in his free fishery the Jury find specially, that the place where is *parcel of the manor of D.* and that the plaintiff is *seised of this manor in fee*, and conclude that they find for the plaintiff, if he could have an action for fishing in his free fishery within his own land; and *adjudged* that the plaintiff may have such a fishery; for tho' divers may have liberty to fish there besides himself, *this is libera piscaria* in his manor. Skin. 677. Pasch. 9 W. 3. B. R. Gipps v. Woollicot.

7. And Holt Ch. J. said, that he was not satisfied, but that where the owner of the soil had a right to fish with others, that he might have an action of *trespass*; for there is such a writ in the register, and it does not lie for one who has but a liberty to fish; and tho' he might have clausum fregit, & in aqua sua piscatus, yet

he thought that trespass lay; and if it be not proved e contra, it shall be intended his separate fishery of common right; but as to the objection of pisces suos or ibidem, the Court seemed to think it was ill. Cur' adv' vult. Skin. 678. Gipps v. Woollicot.

[For more of Place in general, see Prescription, Trespass, and other proper Titles.]

## Place.

### (A) Pleadings. In what Cases the Place is material.

Heath's  
Max. 8.  
cites S. C.

1. **I**N *real actions* it is not usual to count of a year, day and place, as of the gift in formedon, alienation in dum fuit infra ætatem &c. nor in *mixt actions*, as assise, waste, and quare impedit; *contra* in *personal actions*. Br. Count, pl. 59. cites 7 H. 7. 5.

2. In *transitory actions* time and place are *not* material, but the plaintiff may declare at any time or place. 10 Mod. 251. 348. Hill. 3 Geo. 1. B. R. Cole v. Hawkins.

3. In *assise*, the tenant said, that the plaintiff was not born in England, nor within the allegiance of the King, and the others e contra; and there he shewed place where he was born; and ibi venit jurata. Br. Visne, pl. 71. cites 22 Aff. 25.

Br. Lieu, pl.  
34. cites 4  
E. 3. 64.  
and that  
after the  
denial, the  
other in his  
rejoinder  
shall shew  
the place.

4. *Scire facias* upon a fine to execute remainder to the plaintiff, because N. tenant in tail by the fine is dead without issue; the tenant said that N. had issue K. who is in full life; and per Seton J. he need not shew where he is alive till the other denies it; by which the other said that there was no such K. Prist; and the others e contra, that such K. at M. in another county; quod nota. Br. Re-plication, pl. 24. cites 24 E. 3. \* 33.

Quod nota.—\* This seems to be misprinted, and that it should be (64) according to Br. Lieu supra.

Br. Lieu, pl.  
34. cites 24  
E. 3. 64.—  
In forme-  
don, excep-

5. For in *formedon*, where nothing by descent is pleaded against warranty and assets, there he shall shew where the assets lie, and not before. Ibid.

tion was taken, because no place of the assets was alleg'd in the bar; but it was answered, that it shall be alleg'd in the rejoinder after ibi the demandant has reply'd, that tunc per descent. 38 E. 3. 24.—Br. Assets per Descent, pl. 15. cites S. C.—Br. Lieu, pl. 22. cites S. C.

If a man pleads that the defendant administered as executor, or has assets in his hands, or assets by descent, he shall shew in what place, but he need not shew what thing or land. Br. Pleadings, pl. 157. cites 11 H. 6. 1.

6. The place where the Lord distrains for more services [than are due] shall not be alleged in *monstraverunt*. Br. Lieu, pl. 86. —Br. *Monstraverunt*, pl. 1. cites 40 E. 3. 44. S. P.

7. In *assise of rent*, the defendant said, the grant is that the plaintiff should chant in the church of W. or elsewhere, for the souls of &c. and that the plaintiff had not chanted *secundum formam chartæ*; and the plaintiff said he had chanted *secundum formam chartæ*, and good, without shewing in what place. Br. *Assise*, pl. 359. cites 41 Aff. 3.

Br. Lieu,  
&c. pl. 46.  
cites S. C.

8. *Trespass* upon the Case, that the defendant by reason of his land ought to repair certain ditches and banks; and because it was not said in what vill the ditches and banks lay, therefore the writ abated; per Cur. Br. Lieu, pl. 15. cites 46 E. 3. 8. [ 358 ]

9. Debt against A. executor &c. who said that there is another executor in full life, not named &c. Judgment of the writ, and did not shew the place where &c. and good; for if the plaintiff denies it, the other may rejoin, and say that he is alive at B. &c. and well; per Cur. Quod nota bene. Br. Pleadings, pl. 144. cites 10 H. 6. 1.

10. *Præcipe quod reddat* in D. he need not shew that D. is in the same county. Br. Lieu, pl. 8. cites 35 H. 6. 46.

And 6 of  
*trespass* in  
D. without  
saying in D.

In *comitatu* two quod nota; and this seems to be in writ or count; for those shall be brought in the same county where the thing is, or where the act was done; but *contra in bar*, title and pleading; for there he ought to shew the place and county; note the diversity. Ibid.

11. Debt upon arrears of annuity till he be promoted to a competent benefice, and shewed that such a day he took feme, and for the arrears due before he brought the action; Chocke demanded judgment of the count; for this act changes the action of annuity into debt, and therefore ought to shew place, and the best opinion was, that for this default the count is not good. Br. Count, pl. 26. cites 35 H. 6. 50.

S. P. Heath's  
Max. 8 cites  
S. C. —  
S. P. And  
sa where  
the grantee  
brings debt  
upon an-  
nuity grant-  
ed for term

*de auter vie*, he shall allege the death of *cestuy que vie*, and at what place, and there, by the best opinion, the death may make issue, and so of life, and therefore place certain where &c. shall be alleged. Br. Lieu, pl. 9. cites S. C. — But in debt by executors they shall not shew at what place they were made executors; contra of administrators. Ibid.

12. In maintenance, the defendant demanded judgment of the writ, inasmuch as it is supposed that he maintain'd a suit between A. and B. in C. B. and did not say at Westminster or any other place, and yet well per Needham, Danby, and Ashton Justices, contra Danvers and Prisot Justices; but after they advised. See *Magna Charta communia placita* &c. Br. Brief, pl. 241. [245.] cites 36 H. 6. 12.

Br. Lieu,  
pl. 41. cites  
S. C. —  
Br. Plead-  
ings, pl.  
52. cites  
S. C. —  
Br. Record,  
pl. 37. cites  
S. C. If

one allege a record in Bank, he must say at Westminster or other place. For it is not a record, if it does not say place and judgment. — Where a thing is set forth to be in \* B. R. or Chancery, it ought likewise to be set forth where those Courts were kept, and 27 H. 6. 10. a writ was abated for want of it; per Cur. 12 Mod. 316. *Stringer v. Allison*. — \* S. P. Br. Pleadings, pl. 67. cites 5 E. 4. 8.

But *contra* of C. B. because the statute is, that it shall be in a place certain.—S. P. as to C. B. Br. Pleadings, pl. 121. cites 5 E. 4. 8.

13. In debt against a successor of 10 l. lent to the predecessor, which came to the use of the house, &c. he shall shew the place where it came to the use of the house. Br. Lieu, pl. 53. cites 2 E. 4. 14.

14. In debt for a salary, he need not to declare in what place he did the service; per Danby Ch. J. and others; for it may be that he did it in several counties; quod nota. Br. Lieu, pl. 54. cites 3 E. 4. 21.

15. In debt the plaintiff counted that he was vicar of S. and leased his vicaridge for two years, rendring 10 l. per ann. and for the arrears for two years &c. And it was ordered by the Court, that he shall shew in what county the vicaridge is; for per Catesby he may say, that no such vicaridge in the same county. Br. Count, pl. 61. cites 5 E. 4. 28.

Br. Lieu,  
pl. 52. cites  
S. C.—

*Contra* in a writ, as in trespass in D. or preceipe quod reddat of land in D.

this shall be intended to be in the same county expressed in the writ; but in a plea, no county is expressed before as in a writ. Br. Lieu, pl. 52. cites S. C.—Br. Pleadings, pl. 89. cites S. C.

[ 359 ]  
\* It should  
be 5 E. 4.  
141. b.

But where a man pleads a release, acquittance, &c. which is in bar, and where he recovers nothing,

there it suffices to plead the deed without shewing the place. See the diversity. Ibid.—Br. Lieu pl. 55. cites S. C.

Br. Lieu,  
pl. 56. cites  
S. C. .

16. Debt of 20 l. against executors upon the obligation of their testator, who pleaded fully administered, and so to issue, and at the Nisi Prius, the defendant pleaded that the plaintiff after the last continuance had received 10 l. parcel of his demand at B. Judgment of the writ, and the Court agreed upon argument that it is no plea, if he does not shew in what county B. is. Br. Pleadings, pl. 89. cites 5 E. 4. 138.

17. Debt upon obligation of 20 l. with condition to pay 20 marks at such a day, the defendant pleaded that he paid the 20 marks such a day, and it is no plea without shewing in what place he paid it; quod nota. Br. Pleadings, pl. 90. cites \* 5 E. 3. 141.

18. In replevin, it was agreed per Chocke and Littleton, and not denied, that where a man alleges a deed in count, avowry, or otherwise, where he recovers nothing, or to have return &c. there he shall shew the place and county where the deed was made, by reason of the visne; and there no such place is a good plea. Br. Pleadings, pl. 97. cites 6 E. 4. 11.

19. Debt against executors upon arrears of annuity granted to the plaintiff for life of the testator out of his manor of D. with clause of distress. Judgment was demanded of the count; for it is not shewn in what county the manor is &c. But Littleton J. awarded him to answer. The reason seems to be inasmuch as now the manor is discharged by the death of the testator, and so was the opinion of Pigot; quod nota. Br. Dette, pl. 154. cites 7 E. 4. 26.

But *contra* where he justifies as servant &c. by his command, there he need not shew the place. Ibid.—So in *capias* against N. the sheriff returned that R.

20. In trespass, the defendant justified by command of a stranger; he shall shew the place where the command was given. Br. Pleadings, pl. 102. cites 12 E. 4. 10.

by command of N. rescued N. at B. and ill, inasmuch as he did not return the place where the command was given: Br. Pleadings, pl. 70. cites 3 H. 7. 14.—But in trespass, where he pleads that the franktenement is to N. P. and be by his command &c. he need not say where the command was, still the command be traversed, and then he shall shew the place, and this in the rejoinder, as it seems. Br. Ibid,

21. Debt upon an obligation against a feme, who pleaded espousals at C. in another county, and that she was covert baron at the time &c. And per Cur. she shall not allege the place of espousals, but shall say generally, that covert &c. And so of an infant; for it shall be try'd where the writ is brought, and not where the espousals, or where the obligation is supposed to be made, Br. Vifne, pl. 58. cites 15 E. 4. 32.

22. Scire facias upon a fine of the manor of C. and of two houses and 20 acres of land, and because it is not shewn in what vill the land lay, therefore the writ was abated; contra if it had been of a manor only; for a manor may be out of every vill, and known by name of a manor; quod nota. Br. Brief, pl. 383. cites 19 E. 4. 9.

23. Case was brought for over-riding a horse to York, so that for several days after the horse was not able to do the plaintiff any service, but the plaintiff did not shew in what county York was, and for that reason Choke held the writ ill. 21 E. 4. 79. b. pl. 93. Br. Lieu, pl. 64. cites S. C.

24. In trespass of two coffers, the defendant said, that before the plaintiff any thing had &c. the property was in J. S. who gave to the defendant at B. and made the plaintiff his executor, and died, and the plaintiff was possessed, and the defendant took it &c. and good, tho' no place be alleged where J. S. was possessed, notwithstanding that issue may be taken thereupon; for where no place is alleged, it shall be intended to be where the action is brought, and there the vifne shall come; and after the plaintiff said, that before the gift to the defendant the said J. S. gave to the plaintiff; and the others contra; and now per tot. Cur. because the property is confessed and avoided, and issue taken upon another point, therefore it is no jeofail by the not shewing of the place where the property was, tho' it was material. Br. Pleadings, pl. 157. cites 1 E. 5. 3.

So in formation, the tenant pleaded warrenny and affree, and did not shew the place where the affree is, and the other [replied] that after the descent a stranger recovered the affree by elder title, and had

execution, and this record certified against the defendant. This is not jeofail, inasmuch as the affree was confessed and avoided, quod omnes concealerunt; and yet at first the other might have demurred, because no place of the affree was shewn. Br. Pleadings, pl. 157. cites 1 E. 5. 3.

25. In trespass, the defendant said, that he himself was possessed, and delivered the goods to W. who delivered them to the plaintiff, and he re-took them; there, by the Justices, he need not shew the place where he was possessed. Br. Pleadings, pl. 72. cites 4 H. 7. 5.

[ 360 ]  
Br. Lieu, pl. 48. cites 4 H. 7. 4. S. C.—Br. Vifne, pl. 79. cites S. C.

26. Where a man pleads lease for \* years, exchange or surrender, he shall shew the place where &c. Contra of attornment; but quere inde, and the same seems to be of release pleaded. Br. Lieu, pl. 50. cites 5 H. 7. 24. per Fairfax and Keble.

\* S. P. Contra in a lease for life, for this takes effect by livery, which

is always upon the land; by the best opinion. Br. Pleadings, pl. 93. cites 3 E. 4. 27.—In false imprisonment, where a man pleads release in bar, he need not shew at what place it was made; for it

is matter in writing. Br. Lieu, pl. 40. cites 21 H. 7. 22.—Br. Pleadings, pl. 45. cites S. C.—*So of a surrender or lease*; for it shall be intended upon the land. Br. Lieu, pl. 40. cites 21 H. 7. 22.—Br. Pleadings, pl. 45. cites S. C.—*So of tender of homage*.—Br. Lieu, pl. 40. cites 21 H. 7. 22.—Br. Pleadings, pl. 45. cites S. C.—*But if the other party traverses those things*, then place shall be alleged in the rejoinder. Br. Lieu, pl. 40.—*But he who pleads arbitrement &c. which are merely matters in fact*, shall allege place in his bar where &c. *Quere of this diversity*. Ibid.—Br. Pleadings, pl. 45. cites S. C. But it was not adjudged but adjourn'd.—S. P. Br. Pleadings, pl. 157. cites 1 E. 5. 3.—*He shall say the place of the submission, and the place of the award*. Br. Pleadings, pl. 70. cites 3 H. 7. 11.

† S. P. And so of a *release of land*; *confirmation &c.* Quod nota, per tot. Cur. Br. Pleadings, pl. 157. cites 1 E. 5. 3.—*Contra of a release of actions &c.* Ibid.

27. Note where a man pleads that the intestate had moveable goods in divers diocesses, he ought to shew in what place, and what goods they are, so that the Court may adjudge whether they are goods moveable or not, and shall not stay till the matter be traversed, and then to shew it in the rejoinder; per Rede, Fineux, and Brian; but Keble serjeant contra. Br. Pleadings, pl. 165. cites 10 H. 7. 19.

28. Debt upon an obligation conditioned not to hunt in the plaintiff's warren. The defendant pleads that he did not hunt in his warren; the plaintiff replies, and says, that after the making of the bond, &c. ante diem impetrationis brevis &c. venatus fuit cum retibus. The defendant demurs, and adjudged against the plaintiff; because he doth not allege where his warren lay, that the defendant might have taken issue; and Vaughan said, that venatus fuit cum retibus was nonsense; for it is the dogs that hunt, and not the nets. Freem. Rep. 31. pl. 39. Paich. 1672. in C. B. Bud v. West.

29. Upon a demurrer to a plea in abatement, the defendant said, that she was baptized by the name of Mary, and not of Patience, and the plaintiff demurs, because no place where she was baptized is mentioned, and also she does not say that she was so called at the time of the bill sued; for where an act is alleged there ought to be a place mentioned, because it is traversable, but if it had been that she was known by such name only, it might be tried where the action is brought, because it only concerns the person; but because the defendant did not say that she was called Mary at the time of the bill sued, she ought to give the plaintiff a better writ. Skin. 620. Nichols v. Shepherd.

30. There are two sorts of writs, viz. Breve nominatum & innominatum; the first contains the time, place and demand very particularly; the other contains only a general complaint, without the expression of time or damage; as the action of trespass, which might have been at any time done, and was intended to defend the estate itself against the invasion of the neighbours; and seems to have been thus generally allow'd before the distinction of bounds; and therefore the vill only was alleged where the trespass was supposed to be done, and the plaintiff might count of any trespass committed before the suing out of the original. G. Hist. C. B. 3. cap. 1.

[For more of Place in general, see Manor (S), Master and Servant (S), Travers, Trespass, and other proper Titles.]

## Plea and Demurrer.

## (A) Plea and Demurrer in Equity. Notes.

1. A Plea is a special answer to a bill, or some part thereof, shewing and relying upon one or more things, as a cause why the suit should be either dismissed, delayed or barred. P. R. C. 273.

2. It is of 3 sorts,  
1st, To the Jurisdiction.

In this first  
sort of pleas  
it is to be

shewn, that the Court has *not jurisdiction* of the cause; as *if lands lie in a county palatine, or exempt franchise*, you may plead it, and that time immemorial &c. (or as the case is) all suits at common law and in equity, touching the same, have or ought to have been impleaded, and yet are impleadable in the Courts of the said county palatine &c. before the Chancellor &c. and not elsewhere. P. R. C. 275.—*One plea only is to be admitted* to the jurisdiction; wherefore if the defendant plead such plea as is not sufficient in its nature, or plead the matter insufficiently, he will be put to answer. P. R. C. 275.—*As plea to the substance and body of the matter, so pleas to the jurisdiction shall be determined in open Court.* P. R. C. 275.—Curs. Canc. 181. 184.

Said, If a bill be brought in the Exchequer touching tithes, or other matter, and the defendant exhibits his bill here against the there complainant touching the same matter, the Court of Exchequer has gained jurisdiction by priority of suit, and it may be pleaded in abatement of the bill here. P. R. C. 275.

2dly, To the Person.

As to the  
second, viz.

in respect of the person, it may be shewn, either that the plaintiff is by law disabled to sue, as that he is *outlawed*, or *excommunicated* (which works a temporary disability), or that he is *attainted* &c. (which is a perpetual disability); that he is a *papist convicted*, or that the plaintiff or defendant is *not such a person as alleged*, as  *feme sole, heir, executor, or administrator* &c. and is not therefore to sue or be sued as such for the matter in question. P. R. C. 276.—So the defendant may plead *excommunication* in the plaintiff, which must be *certified by the ordinary*, either by letters patents containing a positive affirmation that the complainant stands excommunicated, and for what, or by letters testimonial, reciting *quod scrutatis registeriis invenitur* &c. and either of them must be *sub sigillo*, and so pleaded. P. R. C. 277, 278.—Outlawry or excommungement in a *prochein amy or guardian*, cannot be pleaded or alleged in disability, where an infant sues or defends by him. P. R. C. 278.—Curs. Canc. 185, 186.

3dly, In Bar. P. R. C. 273.

A plea de  
bar is com-

monly where some foreign matter or thing is shewed, whereby, supposing the bill &c. true, yet the suit or bill, or some part thereof is barred. Sometimes it is an *act of parliament*; as the *statute of limitation* of actions, the *statute of frauds* &c. Sometimes a *record*; as a *common recovery*; a *verdict* at law; a *verdict and judgment* &c. Sometimes *both a statute and record*; as a *fine with proclamations* according to the statute, and five years *non-claim*. Sometimes it is a *matter in pais*; as a *release*; an *account stated*; notwithstanding which, a defendant must ordinarily answer a particular fraud &c. if any be alleged. P. R. C. 279.—If the *defendant's title be paramount* the plaintiff's, he may plead it in bar. So if the plaintiff has granted or released his right to the defendant. So, a *lease*, or a *purchase for a valuable consideration* &c. may be pleaded in bar; the defendant by way of answer denying any notice of the plaintiff's title or claim. So, a *long peaceable possession*, as 60 years or more, may be pleaded in bar. P. R. C. 279.—Sometimes this plea is to the very ground and foundation of the suit; as in a bill for discovery of title &c. the defendant may plead, that the complainant has conveyed the *premises in question*, or his right to them &c. to another person. P. R. C. 279, 280.—*All or several of the matters in bar may be pleaded together.* Sometimes a  
suit

*suit depending here, or elsewhere, is pleaded in bar. So a decree or dismissal in this Court. P. R. C. 230.—If a decree is had, and the party brings a bill intending to review the decree, but does it by way of original bill, and not in form of a bill of review, the defendant may plead the decree in bar. P. R. C. 230.—Curl. Canc. 187, 188.*

3. When a bill is in the disjunctive, the defendant by his plea may take it either way; per *Ld. North. Vern. 219. Hill. 1683. Cresset v. Kettleby.*

[ 362 ] 4. The defendant cannot plead *after a proclamation return'd*, nor can a plea be taken on a *general commission* to take the answer only, and not to plead answer or demur; per *Ld. North. Vern. 275. Mich. 1684. Loyd v. Gunter.*

5. Where the defendant *answers to part, and pleads to the rest*, the plaintiff cannot put in *exceptions* to the answer till he has first argued the plea, or obtained an order that the plea shall stand for an answer, with liberty to except to the matters not pleaded to. *Vern. 344. Mich. 1685. Darnel v. Keyney.*

6. If the plaintiff *replies to the defendant's plea*, he thereby admits it to be good, if it be true, and the validity of the plea can never after be considered, but only the *truth of it*, as he proves it, or the plaintiff disproves it. *Ch. Prec. 58. Mich. 1695. Parker v. Blythmore.*

7. Tho' a plea in bar be *allowed*, yet the plaintiff may *reply to the truth of it, and put defendant on proving it, and may except to any other part of the answer.* *G. Equ. R. 184.*

8. Pleas which *tend to support wrong-doing must have the greatest strictness and exactness.* *G. Equ. R. 187. Gascoyne v. Sidwell & al.*

### (B) To Bills of Account.

1. BILL was brought to be relieved against an *action by guardian for detaining infants*; and to have an account of the rents and profits of the real estate. The defendant pleaded that he is *remainder-man in tail*, if the infant die without issue, and that the *guardianship was devised to him*, and he was made executor, and the plaintiff had a legacy of only 10s. left her. The plea was allowed, unless the will should be disproved. *Fin. R. 200. Hill. 27 Car. 2. Corcellus v. Corcellis.*

2. Bill was brought, was for an account of copartnership. The defendant pleaded an *award, averring the matter in question comprized in the award.* The plaintiff replies generally that there was no such award; and tho' the plaintiff ought to have set down the plea to be argued, and not to have replied to it, yet decreed that the defendant account: but after (tho' that decree was signed and inroll'd) the Court ordered the defendant only to answer over. *Vern. 72. Mich. 1682. Farrington v. Chute & Ux.*

3. Bill was brought by one *incumbrancer* against an assignee of incumbrances, and in possession, for an *account*, and that defendant might accept what, if any thing, was due to him, and plaintiff

plaintiff be let into a satisfaction of his debt; but omitted praying payment of the surplus to the plaintiff. On the account it appeared that the defendant was overpaid 4000 l. The plaintiff then proceeded at law, and sued a *scire facias* on his judgment, and took out execution by *elegit*; after which the plaintiff brought his bill to have the 4000 l. towards his debt; to which the matter before mentioned was pleaded in bar, and the Court allowed the plea. Jefferies C. Vern. 349. Mich. 1685. Hale v. Thomas.

4. *Detinue of charters* is a good plea in bar of account in equity, as well as at law. 2 Vern. 33. Hill. 1688. Countess of Plymouth v. Bladen.

5. A. the mortgagee brought a bill to foreclose, and B. the mortgagor brought a cross bill to redeem; and it was decreed to pay principal, interest and costs, or else to be foreclosed, and on payment to be let in. B. died, and the account being taken, the plaintiff finding the estate insufficient, brings a new bill of revivor, and partly a supplemental bill, both to review the former decree and proceedings, and likewise to have an account of the assets of B. and thereout to have satisfaction for a bond which was given for a collateral security with the mortgagee. [ 363 ] To this bill the executor of B. pleads the former decree in bar, that the plaintiff elected his satisfaction, and had not so much as suggested that that satisfaction was deficient; so that it does not appear but that he may receive a double satisfaction for his debt, and that it was plain that he had not waved the mortgage by his bill of revivor. A. insisted that it was the practice of the Court, that taking out of process, or making use of any counter security, was in itself a waiver of the foreclosure, and that a mortgagee had always his election to wave and open the foreclosure, and have recourse to his bond or covenant, if he thought proper. But per Cur. the plaintiff by his revivor has not waved the mortgage, or so much as suggested a deficiency; so that the plea must stand for an answer without liberty to except. G. Equ. R. 186. Hill. 12 Geo. 1. Birch's Case.

### (C) To Bills of Discovery of Personal Things.

See (E) pl. 1. 2.

1. BILL was brought against a clerk of a company to produce the company's books of account; he pleaded that he is sworn not to shew or deliver the said books without the consent of the master and wardens &c. And because the other defendants might be compell'd to produce the said books, the plea was allow'd. Fin. R. 24. Mich. 25 Car. 2. Gregg and Stileman governors of Tunbridge school in Kent & al. v. Cotton & al. defendants.

2. Bill was brought against an executrix of an executrix to discover the personal estate of the first executrix, suggesting that 'twas the intention of her testator that a moiety of the estate, of which she should be possess'd at her death, should go to and

be divided among the plaintiffs &c. The defendant pleaded that she was made executrix of the first executrix; and demurred, for that her testator had no power to impose on her how to dispose her estate, and that she had taken an oath truly to administer. The plea and demurrer were both allowed. Fin. R. 31. Mich. 25 Car. 2. Cowpland & al. v. Carter.

3. Bill was brought to discover the personal estate of an intestate, who was the plaintiff's grandfather; defendants pleaded a deed of bargain and sale from one administrator under whom they claim, and that one of the defendants is administrator likewise to the said intestate; and demurred, for that the plaintiff has no title. And the Court allowed both the plea and demurrer. Fin. R. 44. Mich. 25 Car. 2. Newman v. Holder.

4. Bill was brought for an account of the sale of goods taken in execution at an under-value, and of the equity of redemption of a mortgage, and of money received to compound debts; the defendant pleaded that before he bought the goods of the sheriff, and afterwards, they were offered to the plaintiff at the same price for which he bought them; and pleaded a release of the equity of redemption of the mortgage for 600l. paid, and a receipt given, and a general release from the plaintiff to such a day, and that the release was without fraud; and that by his answer he has given an account of what monies he received to compound the debts of the plaintiff. And the pleas were allowed. Fin. R. 111. Hill. 25 Car. 2. Dean v. Gavel, Briggs & al.

[ 364 ] 5. Releases given on payment of portions were pleaded to a bill of discovery and account of a will, and the rents and profits of the testator's real and personal estate, but without setting forth that there was any discourse concerning the estate or lands of the testator when the releases were executed: the word plea was ordered to be struck out, and defendant to answer the bill; but as to the other part of the bill, which demanded an account of the rents and profits of the lands, the defendant was not to answer, unless on hearing the Court should think fit to decree an account thereof. Fin. R. 117. Hill. 25 Car. 2. Ld. Herbert and Brownlow v. Mountague.

6. Bill was brought by a judgment creditor's administrator, to discover the intestate's personal estate; the defendant put in an insufficient answer, and some time after pleaded that administration was since granted to another by the Prerogative Court, which was a repeal of the administration granted to the plaintiff, that being out of an inferior court. But the plea over-ruled with costs. Fin. R. 233. Mich. 27 Car. 2. Carlisle v. Hardress the widow of the intestate.

7. Bill was brought to discover a debt, the bond given for securing the payment thereof on the stating the account being lost; the defendant pleaded the statute of limitations, and demurred, for that the plaintiff did not make oath of the bond's being lost, and not to be found. And the plea and demurrer was allowed. Fin. R. 266. Mich. 28 Car. 2. Latchwell v. Foster.

8. Bill was brought against an executor of a citizen of London by

by one intituled to a share, for an account: the defendant pleaded an *inventory and discharge by the Court of Orphans*, and that having afterwards received more money, plaintiffs and executor accounted, and gave the executor a *release of all actions*, suits and demands whatsoever relating to the said account. The Court thought this an *issuable plea*, and not in bar, and that the plaintiff might reply to it, and take issue, as he should be advised, without costs on either side. Fin. R. 327. Mich. 29 Car. 2. Banks v. Banks.

9. Bill of *discovery* was brought by *administrator* for the personal estate; the defendant pleaded that the *administration is litigated* on account of a will produced, in which the administrator is made executor; but the plea was over-ruled, as containing no equity. Vern. 106. Mich. 1682. Wright v. Blicke.

### (D) To Bills of Discovery of Titles.

Sec(F) pl. 4.

i. BILL was brought to *discover the title of a member of parliament* to lands, suggesting that they were conveyed to him *on purpose to hinder proceedings at law by his privilege*. He pleaded a *mortgage* from another of the defendants for a considerable sum of money *not paid*, and so discovers nothing whereof the plaintiff prayed a discovery as to his title, estate, or interest in the premises; but the Court over-ruled the plea, and ordered him to answer the bill. Fin. R. 205. Hill. 22 Car. 2. Holland v. Bludworth and Parker.

2. A bill was brought to *discover a title to lands, and a release*. The defendant sets forth the date of the deed, and that the plaintiff *for a valuable consideration conveyed to defendant's father*, and then sets forth a *verdict* on full evidence, and pleaded the same in bar thereof, and of all other demands in the bill, and demurs as to the discovery of the purchase deed, it being the plaintiff's own act, and will serve only to help to impeach the same if there should be any defect in the body of the deed, or in the form of executing thereof; and to discover the *names and habitations of the witnesses* would be to give the plaintiff and the other defendant ward an opportunity of *tampering* with them in order to stifle their evidence. The Court allowed both plea and demurrer. Fin. 205. Hill. 22 Car. 2. Hellam v. Grave.

3. Bill was brought to *discover a title to a term for years*, the plaintiff claiming the reversion. The defendant pleaded that *he is seized of the inheritance by several conveyances for valuable considerations, and has enjoyed quietly for 50 years*. The Court allowed the plea, but left the plaintiff to reply, and proceed as he shall be advised. Fin. R. 266. Mich. 28 Car. 2. Peacock v. Neale.

4. Bill was brought to *establish an old settlement*. The defendant pleaded that tenant in tail in possession levied a *fine*, and suffered a *common recovery* to bar the entail, and declared the uses to himself and his heirs; the plea was allowed, with liberty for plaintiff

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plaintiff to reply. Fin. R. 306. Trin. 29 Car. 2. *Rofs v. Pudsey and Stephens.*

5. Bill was brought by issue in tail to *discover a settlement*; the defendant pleaded that the *plaintiffs are bastards*. And a trial at law was directed upon that point, and that defendants pay the plaintiffs 50l. to carry it on; but the money not being paid, nor the trial had, the plea was over-ru'd. Fin. R. 324. Mich. 29 Car. 2. *Devereux v. Devereux and Thelwell.*

6. Bill was brought to *discover deeds* concerning lands which the plaintiff claim'd as heir. The defendant pleaded that a *fine was levied, and the uses declared by deed*, under which the defendant and his ancestors had *quiet enjoyment for 60 years*; and demurr'd, for that the plaintiff hath *not set forth the time when any settlement was made* by the ancestor, and under which the plaintiff claims a title, nor *the date thereof*, nor that the plaintiff, nor those under whom he claims were in *possession of the premises for 60 years* before the bill, nor when they were in possession; and both plea and demurrer were allowed. Fin. R. 336. Hill. 30 Car. 2. *Fith v. Courtney.*

7. Bill was brought to *discover a title to a house in London burnt down in 1666*. The defendant pleaded a *decree of the Court of Judicature* for rebuilding the city, and demurs; for that the plaintiff is *barred by the statute for rebuilding*, and if not barred he has a proper remedy *at law* as any other reverfioner hath, the privy being made and continued by act in law. The Court over-ru'd the plea and demurrer, and ordered an answer in chief. Fin. R. 427. Mich. 31 Car. 2. *Culpepper v. Wigg & al.*

8. Mortgagees brought a bill to *discover settlements, and what estate the mortgagor had* in him. The defendants pleaded two several settlements whereby the mortgagor *was only tenant for life*; the plea was over-ruled, because the defendants did not *offer by way of answer to admit the tenant for life to be dead*, that so the plaintiffs might try the validity of these settlements at law; for if they should expect till tenant for life be dead, their witnesses that could prove the fraud might be dead likewise. Besides, the defendants pleaded these settlements to be made after marriage, in pursuance of promises and agreements made before marriage, and did not set forth what those promises and *agreements* were. Vern. 139. Hill. 1682. *Ld. Keeper & al. v. Wyld & al.*

## (D. 2) To Bills of Discovery of Trusts.

1. BILL was brought for *discovery of a trust* of an estate purchased, and if defendant had not the money from the estate of the supposed cestui que trust the ancestor of the plaintiffs, and to have an *account*. The defendant denied the trust, and as to the money he pleaded a *release of all demands* concerning any money received or disburs'd by him for (Mr. Cook) the ancestor, or for or concerning Mr. Cook's estate; and that if any  
of

of the purchase-money was raised out of his estate, it was intended to be released thereby, and demurred; for that if the money was raised out of Mr. Cook's estate, it was not sufficient to raise a trust, or to discharge the defendant against the *executors* of Cook; because they were *not parties* to the suit; and that defendant ought not to discover the profits *till the trust be proved*. Ordered, that till a probable proof be made of the trust, the demurrer shall stand. But as to making the executors of Cook parties, the demurrer was over-ruled. Fin. R. 4. Mich. 25 Car. 2. Astley v. Fountain.

2. Bill was brought to *discover* on what *trust* a lease was made; the defendant pleaded a *decree* made *against the plaintiff*, and a *dismissal* of a former bill; and demurs, because it is to *draw again into examination a matter already determined*; and for that a *decree cannot be altered by an original bill*; but in this case the plaintiff having got to himself a *new title* by purchasing in the fee and the original lease, he stands in the place of the feoffor and his original lessee, so that now such discovery is just and reasonable; and ordered the defendant to answer as to the trust charg'd between the defendant and the original lessee, and on what trust the lease was assigned to him, and if after payment of the money the estate was to return; and the benefit of the plea was fav'd to the hearing the cause. Fin. R. 228. Trin. 27 Car. 2. Astry v. Ballard. [ 366 ]

(E) To Bills of Discovery. *Want of Parties.*

See (D. 2)  
pl. 1.

1. BILL was brought *against an administrator* by a creditor to discover judgments, suggesting them to be fraudulent; the defendant pleaded the statute of *limitations*, and that before the exhibiting the bill, *his administration was repealed by sentence* in the Prerogative Court, and *administration granted to another* during the minority of the children, and that neither *the children or their guardians are made parties* to the bill. The Court allowed the plea as to the personal estate, but over-ruled it as to the *real estate*. Fin. R. 243. Hill. 28 Car. 2. Davis and Harvey v. Dee & al.

2. Bill was brought by a judgment creditor to *discover the estate* of the debtor, who was dead *intestate*. Defendant demurred, because the *administrator is not made a party*, the defendant being only debtor to the intestate, and also pleaded the statute of *limitations*, the contract between the defendant and intestate being above six years since, and both the plea and demurrer were allowed. Fin. R. 303. Trin. 29 Car. 2. Rumney v. Mead.

See Purchase  
Bills.

(F) To Bills of Discovery. *That he is a Purchaser &c.*

1. BILL was brought by assignee of an equity of redemption against the mortgagee and mortgagor to *set aside a release* made to the mortgagee in fee after notice of the assignment. Mortgagee pleaded the *release for a valuable consideration*, and that the mortgagor had brought his bill for a reconveyance (which was decreed, but after dismissed by consent of mortgagor and mortgagee), and that the said bill was dismissed, and the said *dismissal sign'd and inroll'd*. The plea was allow'd, but left the plaintiff to reply, and take issue if he thought fit. Fin. R. 46. Hill. 25 Car. 2. Madge v. Wheeler and May.

2. Bill was brought to *discover a title*; the defendant pleaded *two verdicts* (whereof one was at bar) and judgments in ejectment by his father, and a *writ of possession*, and a conveyance to B. for a valuable consideration, and a conveyance by B. for a valuable consideration to the plaintiff. The plea was allowed, and bill dismissed with costs. Fin. R. 70. Hill. 25 Car. 2. Pitt and Lady Chandois v. Hill and Broadway.

3. A. indebted to B. in 260 l. assigns over to B. the benefit of a decree against C. Afterwards A. agreed with C. to release to him all benefit of the decree, and all suits and demands. B. brought his bill to *set aside the release*. C. pleaded the release for a valuable consideration, and that he had no notice. The Court allowed the plea; and there being several securities mentioned in the release as made over by C. to A. in consideration of such release, decreed those securities to be made good to the plaintiff B. to enable him to receive satisfaction for the 260 l. and A. and C. covenant not to release such securities till B. is satisfied. Fin. R. 218. Trin. 27 Car. 2. Hookes v. Simball.

4. Bill was brought to *discover a title*, and to examine witnesses *de bene esse*. The defendant pleaded that he is a purchaser for a valuable consideration, and without notice; and demurr'd as to the examining witnesses, for that he is a real purchaser, and the plaintiff may compel the witnesses by a particular statute to appear in any Court to give their evidence, or recover damages against them. The Court allowed the plea and demurrer, and that such deposition as had been already taken de bene esse be suppressed. Fin. R. 255. Trin. 28 Car. 2. Everenden & al. v. Vanacre & al.

5. A conveyance was made in consideration of 250 l. The bill suggested that it was in trust for the plaintiff and no money paid, but that it was to screen the plaintiff from other creditors, and therefore prays a reconveyance. The defendant pleaded that the plaintiff was indebted to him by bond 250 l. which bond defendant delivered up to plaintiff, and thereupon plaintiff gave defendant a release of all his right &c. The Court ordered, that if defend-

defendant would positively swear that plaintiff was indebted to him 250 l. for money really lent and paid before the bond given; and that all was due when the conveyance was executed, then the plea should be allowed. Fin. R. 335. Hill. 30 Car. 2. Hart v. Hergard.

6. The defendant pleaded that he was a purchaser bona fide for a valuable consideration; but there being several badges of fraud alleged in the bill, which the defendant denied in the plea, and not by way of answer, the plea was over-ruled. Vern. 185. Trin. 1683. Price v. Price.

(G) Former Suits, Decrees &c.

See (D. 1)  
pl. 2.

1. A BILL was first preferred in the Court of Requests, and the same being mistaken, another was preferred in Chancery; the defendant pleaded the proceedings in that Court. But it was over-ruled. Toth. 84. cites 9 Car. Samuel v. Samuel.

2. Bill was brought by an heir against lessees to have an account of profits, and dies; the next heir (an infant) revives the suit. The account is settled, and the infant at 19 years old and his guardian take 93l. surplus of the profits from the lessees, pursuant to the decree. The infant coming of age takes administration to him to whom he was heir, and exhibits a bill original without taking notice of the former suit. The defendant, the surviving trustee, pleaded the former decree and payment in bar; and the question was, whether the plaintiff, having had account as heir, shall have it again as administrator? and the plea over-ruled. 3 Ch. R. 77. 1572. Strickland v. Lock.

Nelf. Ch.  
R. 149. 3.  
C. by name  
of Strickland  
and v.  
Locke.

3. Bill was brought by the heir at law to discover a revocation of a will, under which the defendant claimed as a purchaser, and pleaded another bill in the Exchequer for the same matter, and after a full hearing dismissed, and the dismissal signed and inrolled. The plea was allowed. Fin. R. 102. Hill. 25 Car. 2. Bassett als. Seymour v. Nosworthy.

A decree  
was obtained  
in the  
Exchequer  
against two  
of the inhabitants  
of  
Bridgnorth,  
to establish

a custom for all the inhabitants there to grind at the King's mills; and this decree was had without any trial, and afterwards affirmed in the House of Peers; and now this bill was brought in Chancery by other inhabitants of Bridgnorth, to prevent multiplicity of suits, and to examine witnesses in perpetuum rei memoriam, and to discover evidences in the defendant's hands. And in the bill they deny that there is any such custom for grinding &c. and alledge that the former decree in the Exchequer was obtained by collusion, and that the defendants would not bring any action at law, till the plaintiff's witnesses were dead; and they likewise pray a discovery, whether the inhabitants in new foundations, as well as old, are obliged to grind at the King's mills? To this bill the defendants pleaded the former decree in the Exchequer, and affirmation of the House of Peers in bar; and also demurred to the bill, but had not, as was affirmed, denied the collusion charged by the bill; and the Court held, that the tenor of the bill was directly to question the justice of the former decree, and that the charge of collusion need not be answered, being only inserted to give the Court jurisdiction; and if there was any redress, it must be by application to the House of Peers. Mich. 1699. Abr. Equ. Cases 139. Jay & al. v. Braine.

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4. A former bill depending was pleaded in bar to a second; but though both bills were of the same matter and effect, the latter

*latter had some new matter.* Ordered, that since the plea was good, the plaintiff should pay the usual *costs* of a plea allowed. But the defendant to answer the second bill, and the former bill dismissed with 20 s. costs. Chan. Cases 241. Mich. 26 Car. 2. Crofts v. Wortley.

Tr. 27 Car.  
2. Fin. R.  
231. In  
Case of  
Coke v.  
Bishop and  
Verdon.

5. Defendants pleaded a *former decree* made in a cause, in which defendants were plaintiffs, (but against another person not party to this suit, and the now plaintiff was no party to that), and confirmed upon an appeal; and demurs, for that this bill contains the same matters as were in issue in the former cause. And the plea and demurrer was allowed. Fin. R. 124. Mich. 26 Car. 2. Rutland v. Brett.

6. Defendant pleaded a *former bill depending*, and brought by the same plaintiff for the same matter, and demurred; for that there was *no equity* in the bill, and that the same being 200 sheets of paper, was stuffed with repetitions, *tautologies*, and *impertinencies*. The plaintiff's counsel insisted that by reason of the demurrer he could not procure a *reference to the Master*, to examine if a former suit was depending or not; so the demurrer was over-ruled with costs, and a reference to the Master to examine into the former and this bill, and if he found it for the same matter, then to tax costs for defendant. Fin. R. 179. Mich. 26 Car. 2. Dumford v. Dumford.

7. Plea of a *former decree*, and that defendant made conveyances pursuant to it; and demurr'd, for that the plaintiff is concluded by the former decree, and therefore ought not to bring an original bill for any matter in issue in a former cause. Fin. R. 230. Tr. 27 Car. 2. Coke v. Bishop.

8. Bill was brought to be relieved for goods in the defendant's hands. The defendant pleaded a *former bill for the same matter*, which upon hearing the cause was dismissed, and an *action* brought for the same matter, in which the plaintiff was *non-suited*, and that there was a *judgment after a verdict* on full evidence, which was affirmed in error; and the plea was allowed. Fin. R. 239. Mich. 27 Car. 2. Cornel v. Warren and Ward & al.

A decree of  
dismissal  
may be  
pleaded in  
bar to a new  
bill, tho'  
not signed  
and inrolled.  
Vern.  
310. Hill.  
1684. Prit-  
man v. Prit-  
man.—It is

9. A former decree being pleaded in bar, it was objected that the *dismissal and decree* could not be pleaded in bar, because the decree was *not signed and enrolled*, and if defendant would have it that it was a suit still in being, then the plea was a plea in abatement only. But per Ld. North either that suit was for the same matter as the present, or not; if not, you ought to have moved to have had the *plea referred*; but if it is, then that suit is either depending or determined, and either way is pleadable. Vern. 310. Hill. 1684. Pritman v. Pritman.

It is not necessary in a plea of a *former suit* brought for the same matter to aver that such suit is still depending, and such plea ought to be refer'd to a Master to examine the truth of it, and such plea is always put in *without writ*. Vern. 332. Trin. 1685. Ullin v. ....

10. A plea of a *former suit* depending here for the same matter, need not be set down *with the register*, being a matter record-  
ed

ed in this Court: but if the plaintiff be not satisfied with the plea, it shall be referred to a Master to certify the truth thereof; and if it be determined against the plaintiff, he shall pay the defendant 5 l. costs. P. R. C. 281.

S. P. Curf. Canc. 176.  
—An original bill had been brought by an administrator of a judgment-creditor; the administrator

11. Such reference must be procured by the plaintiff, and a report thereon, within a month next after filing such plea; otherwise the bill stands dismissed of course, with 7 nobles costs. P. R. C. 281.—S. P. Curf. Canc. 176.

died, and a bill of revivor was thereupon brought by the executor of the administrator. This bill was thought to be wrong, and thereupon another bill of revivor was brought by the same plaintiff, having taken out administration de bonis non to the judgment-creditor himself, and in the second bill of revivor described himself as executor to the administrator, and likewise as administrator de bonis non of the original judgment-creditor. To this second bill of revivor, the pendency of the former bill was pleaded; thereupon it was referred to a Master, to examine [ 369 ] whether these two bills were for one and the same matter. The Master made a special report, whereby he certified that the latter bill related to the same matter, and that they were both brought by the same person; but that they were brought by him in the different rights that have been mentioned. Thereupon it was moved, that the first bill of revivor might be dismissed with 20 s. costs; that the plea might be set aside, and that the suit might stand revived on the second bill.—Lord Chancellor. The practice under this order has been, that when a reference is made to a Master of a plea of the pendency of a former suit for the same matter, if the Master reports that both bills are for the same matter, the plea shall be allowed and the party is intitled to costs, and the plea, in such cases, cannot be set down to be argued; for then there would be two dilatories; but the plea is ipso facto overruled; and thereupon the plaintiff takes out a subpoena for 5 l. costs, in like manner as upon the arguing of a plea. In the present case, the Master has done neither of these things; for he has only made a special report, and left the matter to be determined by the Court. Thereupon the matter now comes on by motion; and one part of it is, that the plea may not stand in the way; and the foundation of this part of the motion is, that where the same person sues in different rights, it is the same as if there were different persons; and this is certainly true, for which reason the plea must be set aside. However, it must be set aside with costs for two reasons; 1st. because the plaintiff gave some colour for the plea, by bringing the first bill of revivor wrong; and 2dly, because, in the second bill of revivor, the plaintiff described himself executor to the administrator, as well as administrator de bonis non to the original judgment-creditor. Barn. Ch. Rep. 83, 84, 85. Pasch. 1740. Huggins v. the York-Buildings Company.

12. If a suit be depending at common law, or in any other inferior court, it may be pleaded, and the defendant shall not be put to a motion for an election or dismissal: and such plea shall be proceeded in as a plea of a former suit depending in this Court between the same parties for the same matter. P. R. C. 281.

S. P. Curf. Canc. 176.

13. One Pordant had brought a bill in the Court of Chancery against the defendants for several shares in their stock, and after sold a sixth part of what he was intitled to from the defendants to the plaintiff, who now brought this bill for his sixth part: the defendants pleaded that Pordant had before brought his bill for several shares, of which the plaintiff's now demand was part, and that the former suit was still depending; but because he had not averred that the defendants had appeared to the former suit, or put in their answer, or that they were so much as served with process to appear, the plea was disallowed; for 'tis no suit depending till the parties have appeared, or been served to appear, but only a piece of parchment thrown into the office, which may lie there for ever, and never become a suit; but if the former suit depending had been well pleaded, the Court was clear of opinion it would have been a good plea, tho' the bill was brought by another person, and not by the now plaintiff; for otherwise the plaintiff in the other suit, after his bill brought, might assign

his shares to 20 several persons, who might each of them bring several bills, and so harass the defendants for what the first suit was sufficient. Abr. Equ. Cases 39. pl. 14. Trin. 1729. between Moor and Welsh Copper Company.

### (H) That it is a Matter at Law.

1. **B**ILL was brought to be relieved against a verdict and judgment: the defendant pleaded the *verdict and judgment*, and that all the matters prayed in the bill were *examined at law*, and to another part of the bill, which seeks relief for the defendant's *diet and lodging* at the plaintiff's house, the defendants demur, for that the plaintiff has her *remedy at law*. The plea was disallowed, and defendants ordered to answer, and that the plaintiff should be concluded by such answer, and if defendants shall not in their answer discover that some of the goods for which they had got a verdict do belong to the plaintiff, then plaintiff shall pay them full costs of suit. But the demurrer was allowed. Mich. 26 Car. 2. Fin. R. 171. Armistead v. Parker & Ux.

[ 370 ] 2. Bill was brought to be relieved against a *judgment irregularly obtained*; the defendant pleaded *the judgment*, and likewise demurred; for that if the judgment was obtained as suggested, it is *examinable only in the Court where it was obtained*, and not in this Court. The Court allowed both the plea and demurrer. Fin. R. 204. Hill. 27 Car. 2. Huddleston v. Atbugg.

3. Bill was brought to be relieved against a *writ of inquiry executed without notice* given to him or to his attorney, and that the judgment was not fairly obtained; defendant pleads and demurs, for that the *remedy is at law*, and plea and demurrer allowed. Fin. R. 335. Hill. 30 Car. 2. Boyce v. Lomax.

4. Indeb. Ass. was brought for goods sold and delivered, and a verdict for the plaintiff; the defendant brought a bill suggesting that he was master of the buck hounds, and *acted only in relation to his office*, and that the King ought to pay for those goods; the defendant pleaded the *verdict and judgment*, and that the plaintiff had insisted on the same matter at law, where it was ruled with him, and that a writ of error being near spent, he now brought this bill *for delay*; and demurred, for that the matter was *conusable at law*, and the bill contained no equity; but it was over-ruled, and defendant ordered to answer the bill; per commissioners. 2 Vern. 146. Trin. 1690. Graham v. Stamper.

### (I) Limitations. Statutes.

7. **B**ILL was brought to have satisfaction for 220l. paid by plaintiff's husband for the use, and by direction of defendant's husband, as appears by a note or letter wrote by defendant's

defendant's husband to plaintiff's husband 22 years before, and charges the defendant to set forth, whether the note now insisted on be not the proper hand writing of her husband, and further charges her with assets sufficient to pay &c. The defendant pleaded the *Stat. 21 Jac. of limitations*; but per Cur. this plea is not good, because plaintiff charges a *discovery of the note*, and if it is her husband's hand writing; and ordered the defendant to answer to that matter, and that the plaintiff might proceed at law on the note as he shall be advised. Fin. R. 14. Mich. 25 Car. 2. Downing v. Kirby.

2. Bill was brought by a judgment-creditor to *discover the estate* of the debtor who was dead *intestate*. Defendant demurred, because the *administrator is not made a party*, the defendant being only debtor to the intestate, and also pleaded the statute of *limitations*, the contract between the defendant and intestate being above six years since; and both the plea and demurrer were allowed. Fin. R. 303. Trin. 29 Car. 2. Rumney v. Mead.

3. A bill was brought for an account of a real and personal estate, and to have the same applied towards satisfaction of a debt; the defendant pleaded the statute of limitations. The Court decreed, that where both estates are subjected to the payment of debts, if the personal is sufficient, the real is no further to be accounted for; but if the *real estate is expressly charged with the payment of debts*, then so long as it remains subject to the payment thereof it will *draw both estates to an account at any time*; because the personal estate ought in the very nature of the thing to go in ease of the real estate, and therefore the statute of *limitations* cannot interpose or be any bar to an account thereof; and so over-ruled the plea as to the statute. Fin. R. 458. Trin. 32 Car. 2. Davis v. Dee.

(K) Outlawry.

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1. **W**Here a man was outlawed, and *sued as executor to another*, the plea to the same was over-ruled. Toth. 139. cites 12 Jac. Arnold v. Arnold.

Outlawry is a plaintiff, executor or administrator is no

good plea; for they sue in *auter droit*. P. R. C. 277. — S. P. Vern. 184. Triq. 1683. Killigrew v. Killigrew.

2. A plea of *outlawry* was over-ruled because it was not put in upon oath. 2 Vern 37. Hill. 1688. Parrot v. Bowden.

Being only the common averment of identity of

person it was allow'd good without oath; per Cur. Ibid. 198. Mich. 1690. Took v. Took. — Ruled accordingly by Ld Keeper. Chan. Cases 258. Hill. 20 & 27 Car. 2.

3. An information is exhibited by the attorney-general of the Dutchy Court in behalf of one part owner of coal mines against the other for not contributing to the charge of working them, by which the King would lose his duty; the defendant pleads

outlawry in the relator, and held good; for the relator is to have the whole benefit or loss of the suit, and the King not directly concerned, and very little by consequence. Ch. Prec. 13. Trin. 1690. Attorney-General at the relation of Vermuden v. Sir John Heath.

4. If outlawry is pleaded, the record or capias thereupon must be pleaded *sub pede sigilli*, and is usually annexed to the plea. P. R. C. 276.

5. The defendant may plead and *ſbew as many outlawries as he can*. P. R. C. 277.

S. P. Curf.  
Canc. 175.

6. If the outlawry pleaded be *in a suit for that very duty, or thing for which relief is sought* by the bill, the plea will of course be disallowed, and the plaintiff shall have a subpœna against the defendant for five marks costs, and to make a better answer. P. R. C. 277.

S. P. Curf.  
Canc. 175.

7. If a plaintiff think a plea of outlawry insufficient thro' mispleading, or otherwise, he may, upon notice to the clerk of the other side, *set it down with the register for the judgment of the Court*; but if *within eight days after filing the plea the plaintiff do not so enter it with the register*, the defendant may take out process for five marks costs, as if the plea had been argued; for the defendant is not bound to set it down, seeing it is a matter pleaded under seal. P. R. C. 277.

S. P. Curf.  
Canc. 175.

8. After the outlawry is *reversed*, the defendant, on a *new subpœna* served on him, and 20s. costs paid him, shall answer the bill. P. R. C. 277.

### (L) Releases.

i. **A.** Contracted to sell land to B. and B. assigned it to C. Upon a bill A. had a decree against B. for performance, he being the party to the contract, but decreed that C. *should stand in place of B. and indemnify him against that and all other decrees*. After this B. and C. came to an account, and mutual general releases given, in which the words, *all orders and decrees of the Court of Chancery are inserted*; afterwards upon petition A. has an order for interest from the time of B.'s taking possession, amounting to 700l. founded upon the decree made before the releases were given. B. brings his bill to compel C. to pay it, he being by the decree to stand in B.'s place. C. pleaded *this release subsequent to the decree*, and it was allowed per Cur. tho' it was not taken notice of at the time of stating and settling the accounts. G. Equ. R. 184. Hill. 12 Geo. 1. Waters v. Glanville.

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2. A bill was against an executor to have an account of assets and satisfaction of a debt of 650l. secured by judgment against the testator, alleging a devastavit &c. The defendant by schedule set forth the assets, and denied by her answer any waste; and for plea to any relief said, *that testator was in execution on the said judgment in his life-time, and was discharged from thence by the express order of the plaintiff*, and therefore pleaded such discharge

charge in bar, such discharge being a release of the debt both in law and equity, and the plea was allowed. G. Equ. R. 190. Pasch. 12 Geo. 1 Beatniff v. Gardiner.

(M) *After Verdict, Nonsuit, Judgment &c.*

See (H) pl. 1, 2.

1. A Demurrer, because the defendant had *execution at law*, over-ruled. Toth. 139. cites 10 Jac. Artion v. Wolverston.

A, won of B. at cards 15*l.* which B. upon account did

*own to be due to A.* Whereupon A. brought his action of the *case* and declared on an *indebitatus assumpsit* for 15*l.* and upon an *infirmul computaverunt* for 15*l.* To which B. pleaded non assumpsit, and on a trial a *verdict pass'd* for A. for 15*l.* damages, and he hath since taken out judgment and execution. B. brought a bill; but in respect there were only damages recovered, whereof the jurors were the proper judges, and for that the bill was exhibited after judgment and execution, A. demurs and pleads, and demands judgment, whether he shall farther answer that part of the plaintiff's bill as concerns the verdict and judgment. This Court allowed the plea and demurrer. Chan. Rep. 243, 244. 15 Car. 2. Hunby v. Johnson.

2. Bill was brought for a *modus* of 15*s.* per ann. in lieu of tythes, the defendant pleaded a *verdict and judgment* in debt, on 2 E. 6. . . . against one of the defendants for not setting forth tythes &c. and the plea was allow'd. Finch's R. 13. Mich. 25 Car. 2. Bluck & al. v. Elliot.

3. Bill was brought to be relieved against a *verdict and judgment and an agreement since*. The defendants pleaded the *agreement* and a *former bill brought for the same cause dismiss'd*. The plea was disallowed; but since defendant in the action had brought a *writ of error* on the judgment he might proceed, and if the judgment be affirmed it shall be with a *cesset executio* till the hearing of the cause, and that the plaintiff do within 4 days pay the money recovered at law, into Court, and the defendant Westland, who recovered at law, to give security to abide the hearing &c. Fin. R. 223. Trin. 27 Car. 2. Child v. Westland and Ingram.

4. Bill was brought to supply a defective execution of a power to make leases. The defendant pleaded, that *upon a special verdict at law, judgment was given that the leases were void*. The plea was allowed and the bill dismissed. Fin. R. 275. Hill. 29 Car. 2. Temple v. Lady Baltinglass.

5. The defendant pleaded that the plaintiff here was *nonsuited at law* on full evidence. As to the validity of the plea no certain rule was given. Vern. 77. Mich. 1682. Wilcox v. Sturt.

6. The *assignee* of a lease rendring rent, *having enjoy'd* the land 6 years, *assigns over*. The bill was to call him to an *account for the rent*, for such time as he had enjoy'd the land; the defendant pleaded judgment upon a demurrer at law; and the plea was over-rul'd: for tho' in strictness of law there is no privity of contract to charge the assignee, yet in equity he is most certainly chargeable for such time as he received the profits. The counsel alleged, there were 20 precedents in the case, and the Ld. Keeper said if there had not been ope he should not have doubted

doubted to have made a precedent in this case. Vern. 165. Pasch. Treackle v. Coke.

[ 373 ] 7. After 2 nonsuits and a verdict for the defendant on issue, *within age*, on debt on bond, bill was brought suggesting that the register on which the verdict was given was raz'd and altered. Defendant pleaded the *nonsuits and verdict*, and that the matter suggested was examined at the trial, that the verdict was *twelve years since*. But ordered to answer the bill, and mentioned the Case of HARDER v. SYSE, where after *five trials*, lease or no lease, it was at last discovered, that in an office post mortem the lease was found and set out in hæc verba. 2 Vern. 285. Hill. 1692. Garth v. Egerton.

See (C)  
pl. 3.

### (N) Where Plaintiff sets forth *No Title*.

1. THE plaintiff as executor or *administrator out of an inferior diocese* came to be relieved for a debt; the defendant pleaded, that there was *bona notabilia*, so that the plaintiff could give no discharge; and allowed *ex parte*; but Ld. Keeper declared, he was not satisfy'd of the law, but there being no body for the plaintiff, he would not defend it, and it was after reheard by Judge Archer, who again allow'd it. 3 Ch. R. 71. 1671. Knight v. Bec.

2. A. in consideration of 500l. paid by B. covenanted to settle all the lands he then had, so that they should after A.'s death come to B. and his heirs; and *that all the lands which the said A. should purchase afterwards should be so purchased, and that after A.'s death they should come to B. as aforesaid; and also to leave him all his personal estate*. A decree was made accordingly; after which A. purchased *other lands*, and B. brought a bill to discover what lands he had before, and what he had purchased since the decree, that all may be settled on B. As to the lands *purchased since the decree*, A. demurred, because the plaintiff has not intituled himself by any title accrued since, and the decree extended not to lands he should after purchase, and so is bound by it, and the demurrer was allowed as to that part, but without costs. Fin. R. 230. Trin. 27 Car. 2. Coke v. Bishop.

3. A. brought a bill for *money on an agreement*, and a purchase made 60 years before. The defendant pleaded, that it ought to be presum'd the money was paid, because a *fine was levied 7 years after*, and the money has remained without any demand these 60 years; and demurs, for that the *plaintiff claims not as executor or administrator, nor charges defendant as heir, executor or administrator* of the purchaser. The plea and demurrer were allowed. Fin. R. 344. Pasch. 30 Car. 2. Heupert als. Hoopert v. Benn.

4. Bill was brought to *set aside a will as irregularly obtain'd*, and to *discover what portion* defendant brought to the pretended testator. The defendant denies by answer, that the will was *irregularly obtain'd*, and pleaded the *will in bar*, and demurs, for that

that it appears by plaintiff's own shewing, that he has *no title* to have such a discovery as pray'd. The demurrer was allowed with costs, but the plaintiff was ordered to reply to the plea. Fin. R. 397. Mich. 30 Car. 2. Loyd v. Williams v. Owens.

(O) Where the Plea must be *upon Oath*.

See Oath (D).

1. A Bill was exhibited against R. H. supervisor of the last will of T. C. and one R. H. who was no supervisor of T. C.'s will, *was served with process*, and alleged, that the said R. H. who was the supervisor was dead; ordered that the defendant put in his allegation upon oath by way of answer, and then desire judgment, whether he shall be compelled to answer the said bill or not; and therein pray his costs for his wrongful vexation, which shall be thereupon allowed to him. Cary's Rep. 87. cites 19 Eliz. Harrison v. Haule. P. R. C. 272. S. P.

2. Where a plea is not transitory, the defendant may plead a [ 374 ] *foreign plea*; but then he ought to swear it, otherwise it shall not be received. Sid. 234. Mich. 16 Car. 2. B. R. Collins v. Sutton.

3. It was ruled, that a plea of the *privilege of Oxford* should be put in without oath. Chan. Cases 258. cites Mich. 26 Car. 2. The Case of Masters v. Bush.

4. Plea of *privilege* was over-ruled because not put in *on oath*. 2 Vern. 83. Mich. 1688. Gibson v. Whitacre.

5. Baron puts in a plea in the name of him and his wife, and swears to the plea, but the wife would not swear to it. The baron moved that the plea might be accepted, suggesting that the wife did it by combination with her mother the plaintiff. It was ordered that the plea stand as for the husband, and the plaintiff to proceed against the wife. Hill. 28 & 29 Car. 2. per Finch C. Chan. Cases 296. Pain v. ....

6. Pleas in *disability of the person or to the jurisdiction*, need not be upon oath; and so that they be under counsel's hand, they shall be received and filed, tho' the defendant do not deliver the same in person, or by commission. P. R. C. 274. S. P. Corl. Canc. 7. S. P. Ibid. 174.

7. Pleas of any matter of record, or of matters recorded in this Court, need not be upon oath. But pleas in bar of matters in pais are to be upon oath. P. R. C. 274.

8. Where there are matters alleged in the bill, to which the bar reaches not, or some circumstance relating to the matter in bar that requires a particular answer, as fraud &c. the defendant must answer on oath as to these. P. R. C. 280.

9. If a cause has been formerly dismissed this Court, but the dismissal not signed and inrolled, the plea of such dismissal must be upon oath; for till the inrollment it is not recorded. P. R. C. 282.

10. Defendant pleaded articles made on his marriage, and that he was a purchaser for a valuable consideration, and had no notice of the first settlement; but would not swear this plea; and

and so the plea was over-ruled. Chan. Prec. 481. Hill. 1717. Marshall v. Frank & Ux.

(P) *Return of the Plea. How.*

P. R. C.  
274. S. P.  
—S. P. Curf.  
Canc. 181.

1. **A**N answer and plea taken by commission, was *return'd*, *Ista reponso capta fuit per sacrament.* &c. So the plea was not on oath, and therefore rejected, but without costs; because Ld. Keeper apprehended it as the fault or neglect of the commissioners, who took it, rather than of the defendant. 2 Chan. Cases 208. Mich. 27 Car. 2. Jefferson v. Dawson.

(Q) *Put in. At what Time.*

\* S. P. and  
affidavit  
made of the  
party's in-  
ability to  
travel, or other good matter to satisfy the Court touching the delay. Curf. Canc. 176. cites Ord. Chan. 121.

1. **A**FTER an attachment with proclamation *return'd*, no commission to answer is to be made, nor demurrer to be admitted, \* but upon *motion in open Court*. P. R. C. 274.

2. So neither is a *plea* in such case to be admitted without like motion. P. R. C. 275.

3. Whether a plea can be received after defendant has *flood out to sequestration*? MS. Tab. cites 24 March 1716. Harry v. Sample.

- [ 375 ] 4. A demurrer *after a petition for time to answer* is irregular, but a plea is an answer, and is upon oath as well as an answer. Arg. said it was so determined in LD. STRAFFORD'S CASE, who pleaded after time prayed to answer. And the Master of the Rolls ruled accordingly. 2 Wms's Rep. 464. Trin. 1728. Anon.

(R) *How the Plea or Plea and Demurrer must be.*

1. **E**Xcept the matter of the bar be single, and so full a bar as *that the bill requires no further answer, the whole matter is generally set forth* by way of answer; and then so much of it as goes in bar is relied upon by way of plea; and this is intituled, the plea and answer of the defendant. Or the defendant may plead the matter proper in bar, and then add by way of answer, what further is necessary in point of fraud &c. charged. P. R. C. 274.

2. If the defendant is doubtful, whether if he plead the matter of his defence, his plea will be allowed good by the Court; he may *shew the whole matter by answer*, and then insist and rely upon it almost as if he had pleaded it, only he is *not to call it a plea*, nor to have the benefit thereof till hearing. P. R. C. 280.

3. If a defendant do not enter his plea with the register 8 days after filing, it is over-ruled of course, and the plaintiff may take out process for an answer and costs. P. R. C. 282.

S. P. Curf.  
Canc. 107.  
—S. P.  
Ibid. 175.  
—This is

intended of a plea of a matter in pais, and not of a matter of record or recorded; for it is the plaintiff's part to enter these if he so likes, else the defendant within eight days after filing of the plea may take out 5 marks costs, as in-outlawry. P. R. C. 282.

4. On a demurrer and plea to a bill to have an account of the profits of the Mendippe mines in Somersetshire they plead a special act of parliament which had given jurisdiction of the matters arising within the mines to the Courts of . . . . exclusive of all other jurisdiction; per Ld. Chancellor the plea is not good, because altho' you plead an exclusive jurisdiction, yet you do not aver that there is any Court of Equity there. Vern 58. Trin. 1682. Strode v. Little.

5. A plea was held ill, because it went as to any fraud suggested &c. and also because it did not aver that the accounts which were pleaded, were just and true accounts. Abr. Equ. Cases 39. pl. 13. Mich. 1727. Hastings and Draper.

## (S) Pleas. Of setting down the Plea to be argued &c. and what shall be said a Waiver.

1. WHERE the plaintiff conceives the plea naught for matter or manner, he may put it to the judgment of the Court, and have it argued. P. R. C. 281.

Or if he think the plea good, but not true, he may take

issue upon it, and proceed to proofs &c. P. R. C. 282.

2. As pleas that go to the jurisdiction, so those that go to the merits, shall be determined in open Court. P. R. C. 282.

3. If a matter not of record or recorded be pleaded, and the plaintiff desires the opinion of the Court, whether if it be true it be a sufficient bar, it must be argued; and if it be adjudged sufficient, and the plaintiff take issue, the defendant must proceed to prove the truth of his plea by depositions, or other proofs as on answer &c. P. R. C. 282. [ 376 ]

4. Said, If by the defendant's neglect or default his plea is over-rul'd, the Court on motion or petition, in time will order it to be re-argued, the defendant paying 5 l. the costs on over-ruling. P. R. C. 283.

5. Where a plea is ordered to stand for an answer, (as sometimes on arguing it is) costs are seldom given on either side, and the benefit of the matter pleaded is generally saved to the hearing. P. R. C. 283.

This seems so to be where it is somewhat doubtful to the Court,

whether there be not some equity against the matter pleaded. P. R. C. 382.

6. As no demurrer, so no plea is to be set down for hearing on any certain day, except the order be brought to the register to enter 2 days

2 days at least before; and after the paper of pleas &c. is set up in the register's office, no alteration is to be made in it. P. R. C. 283.

7. The plaintiff brought his *bill to be relieved against a fraud* in the defendant in *causing a ship to be sunk, upon which he had made several insurances, and the plaintiff had subscribed several of the policies.* Defendant as to part *pleads pendency of a former suit, and then answers to part, and denies all the fraud charged on him by the bill:* plaintiff replies generally to the answer, without taking notice of the plea, and witnesses were examined on both sides, and the *cause heard, and a trial at law directed which went against the defendant, who petitions for a rehearing, and on the rehearing, the defendant insisted that the plaintiff had been utterly irregular in his proceedings for not setting down the plea to be argued, and disposed of by the Court before he replied, for the plaintiff himself cannot take upon him to over-rule it, be it what it will, but must bring it for judgment before the Court, and for want of that all was irregular, and ought to be set aside; but my Ld. Keeper and the Master of the Rolls were both of opinion, that the defendant by these proceedings had waived his plea, and therefore the proceedings regular, so the cause went on, and the former decree was affirmed.* Mich. 1701. Abr. Equ. Cases 41. Lucas v. Holder.

(T) *Over-ruling his own Plea. What shall be said to be.*

1. A Surrender was made to a *ferme covert* of copyhold lands, with a *power reserved to her to surrender it to such uses as she by writing or last will in the presence of three witnesses should direct or appoint.* She made a will in pursuance of her power executed in the presence of 3 witnesses, and gave it to her daughter and heir. Afterwards she made a surrender together with her husband, to the use of her husband and his heirs. But this was made in the presence of 2 witnesses only, who subscribed their names (as witnesses). But the deputy steward who took the surrender had set his name to it. On a bill by the husband after the wife's death to establish this surrender who would have the steward to be considered as a 3d witness, the daughter (defendant) pleaded a title by the will, and also demurred, for that the plaintiff's title, if any, was only at law, and he might bring ejectment if he thought fit; and it was objected that this plea and demurrer were for one and the same thing, and therefore inconsistent and contradictory to themselves; for the plaintiff may reply to the plea, and go on upon that in this Court, but the demurrer says he has nothing to do in this Court, but must go to law; so that the one is to keep him here, and the other to send him to law; and tho' it is frequent to plead to one part of a bill, and demur to another part, yet it was never known that the defendant pleaded and demurred to one and the same part of the bill by reason of the inconsistency.

**Agency.** On the plea, being first, it was insisted that gave this Court jurisdiction, and then the demurrer afterwards (to send the plaintiff to law) came too late; or at least it was urged, that the demurrer had over-ruled the plea, and that both could not stand: my Lord Chancellor seemed to think the plea good as a plea of the defendant's title, and the demurrer good likewise as a demurrer to the plaintiff's title. But at last he over-ruled the plea and allowed the demurrer. Trin. 1728. Abr. Equ. Cases 42. *Cotter v. Layer.*

[For more of **Plea and Demurrer**, see **Demurrer**, **Discovery**, **Purchaser**, and other proper Titles.]

## Plea and Pleadings.

### (A) *What is, or amounts to a Plea.*

1. **THE** prayer of the privilege of the Court is not properly a plea; for it was anciently demanded by writ, although it be now usually allowed by the Court upon the prayer of the party who claims it; per Latch apprentice in the Law, of the Middle-Temple. And every plea is either a plea in abatement, a plea in bar, or a plea to the jurisdiction of the Court; and the praying of the privilege is none of these, but only a desire of the party, that he may not be sued elsewhere than in the Court where he prays his privilege. 2 L. P. R. 314. tit. Pleas &c.

2. *Demanding of oyer* is no plea. Freem. Rep. 400. pl. 524. *Mayor and Commonalty of London v. Bre.*

### (B) *Of Pleadings in general; Good or not.*

1. **I**T was agreed in præcipe quod reddat, that plea to the writ and other pleas dilatory shall be good to every common intent; because they are in delay &c. And that if it may be taken to two contrary intents, it shall be \*taken the most strongly against the party who pleads it; quod nota. Br. Pleading, pl. 155. cites 32 H. 6. 12.

—But a declaration ought to be good to every intent as it is said elsewhere. Br. Pleading, pl. 155. cites 32 H. 6. 12.

\* S. P. For every man is presumed to make the best of his own case. 2 L. P. R. 296. tit. Pleas &c.

2. A matter of fact may sometimes be a good plea against matter in writing. Br. Barre, pl. 110.

counted on bailment by indenture, yet non detinet is a good plea. Ibid. cites 10 H. 7. 24. — So in debt where the plaintiff counts on a lease for years by indenture, yet the defendant may plead nil debet per patriam. Ibid. — So upon an obligation he may plead non est factum. Ibid.

Br. Resciss. pl. 133. cites S. C. — But a bar is good if it be good to a common intent. Ibid.

As, in detinue of chattels the plaintiff

3. There

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3. There requires in every plea two things, the one, that it be *sufficient in matter*, the other, that it be *deduced and expressed according to the forms of law*; and if either of these be wanting, it is good cause of demurrer. 2 L. P. R. 296. tit. Pleas &c.

4. If the defendant's plea does *not answer the plaintiff's whole declaration*, the plaintiff may well demur. 2 L. P. R. 302. tit. Pleas &c.

5. Every plea *must* be so framed that it may *give a full answer to the matters set forth in the declaration*, to wit, all such as are *material* to be answered unto; and if it do so, it is a good plea, be it a general plea or a special. 2 L. P. R. 305. tit. Pleas &c.

6. If the *falshood* in the defendant's plea is *neither hurtful to the plaintiff nor beneficial to the defendant*, there it shall never hurt the defendant; but where the defendant pleads a false plea, which falshood is detrimental to the plaintiff, and beneficial to the defendant, there it shall; as by a defendant's executor pleading several judgments, and concluding that he hath not assets ultra, the plaintiff may reply, that one of the judgments is satisfied, which replication shall be fatal to the defendant, if it proves true; but to plead that he hath fully administered, and that he hath not bona & catalla præterquam bona quæ non suffic. to satisfy the judgment, is void for the uncertainty; for no sum being mentioned, no issue can be taken; but if it had been said that he had not bona & catalla præterquam bona & catalla ad valentiam, quæ erga satisfactionem judicii præd. onerabil. sunt, it is good pleading. 2 L. P. R. 297.

7. Every plea *must be pleaded either in bar to the action brought, or in abatement of the writ* upon which the action is framed; otherwise it is but a discourse and not a plea; because the plaintiff cannot take an issue upon it; and therefore if the plaintiff do demur upon it, and his demurrer be judged good, he shall have judgment against the defendant for want of a plea. 2 L. P. R. 303. cites Pasch. 23 Car. B. R.

8. If upon a plea in abatement, the defendant pleads that which is *false and issue is taken thereupon, and found for the plaintiff*, this shall be fatal to the defendant, and the plaintiff shall have his judgment; but if the plaintiff demurs to this plea, and hath judgment upon the demurrer for him, the judgment is *quod defendens respondeat ulterius in capite* such a day, which is the day in the rule given by the Court; but if the defendant hath judgment, then there is a *nil capiat per billam* entered. 2 L. P. R. 303.

9. Objected that defendant pleaded that J. S. was tenant in tail, as appears by an inquisition post mortem, whereas he should have pleaded the settlement by which he was tenant in tail; for *matters of fact* are not pleadable. MS. Tab. cites 22 Jan. 1717. Kennedy v. Pigott.

10. Every plea must have its *proper conclusion*. Vide 10 Mod. 166. and what shall be said a good, tho' a less used plea. Vide ibid. 167. Wel tale and Glover, B. R. And see Tit. Conclusion of Pleas supra.

(C) Of the *Parts of Pleading*, Regular and Irregular.

1. **THERE** are *two parts of pleadings*, viz. *regular, and irregular, or collateral*. The *regular parts* are, 1. Count or Declaration.—2. Bar or Plea.—3. Replication.—4. Rejoinder.—5. Surrejoinder.—6. Rebutter.—7. Surrebutter.—And if issue be not joined upon any of these, or misjoined, or any of the pleadings hath been ill or vicious, or part of the matter contained in the plaintiff's suit is omitted to be answered, the Court will award, 8. a Repleader. *But not after demurrer*, except in special Cases. Of these, those by which the plaintiff prosecutes his suit are, 1. Declaration.—2. Replication.—3. Surrejoinder.—4. Surrebutter.—And the pleadings made use of by the adverse party for his defence are, 1. Bar or Plea.—2. Rejoinder.—3. Rebutter; and as the Court may award—4. Repleader. Brown's Anal. 2.

2. The irregular or collateral parts are, 1. Demurrers to any parts of the pleadings above mentioned. Or,—2. Demurrers upon evidence given at trials.—3. Pleas to entries of writs of *scire facias*.—4. Bills of exception to verdicts. 5. Pleas to entries of writs of error. Brown's Anal. 2. [ 379 ]

3. But some take pleadings to be only what comes after the declaration only, (viz.) what is contained in the bar, replication and rejoinder, contrary to the sentiments of the Ancients, who reputed the count or declaration, and all acts entered upon record relating to complaints, suits or actions before the same, as well as those after, to be pleadings, which appears to be evidently manifest from the order of pleadings mentioned by Littleton in his Tenures, and allowed in all ages, viz. —1. To the jurisdiction of the Court.—2. \* Pleading to the person of the plaintiff.—3. † To the count or declaration.—4. ‡ To the writ.—5. ¶ To the action of the writ, and in bar of the action.—Here note, that the 1st, 2d, 4th, and 5th pleas must undeniably be said to be pleadings before the declaration. Brown's Anal. 2.

\* Pleadings to the person are, villenage, outlawry, alien, hors de protection, profession, excommungement.—Heath's Max. 21. —† Pleas to the count are divers, as variance from the writ, want-

ing form, or sufficient declaring upon the condition, and the like, as the case requires. Heath's Max. 21, 22.

‡ Pleas to the writ are of two sorts, viz. the one apparent in the writ, of which the defendant may at all times take advantage; and the other resting upon the plea of the defendant, as *misnomer*, *jointenancy*, *non-tenuie*, *non habetur aliqua talis villa*, or *Over-dale* and *Netber-dale* of the place where the action is laid, and not of which the defendant is named; unless in cases where utlary lieth; and that the lands lie in A. and not in B. and the like; which the defendant is bound to take in time, and to look that he be not concluded of them by his general appearance, continuance or imparlance, as before is mentioned. Heath's Max. 22.—And note, that it appears in a Report, 3 Eliz. that if the defendant, for matter apparent, plead to the writ, he shall in the beginning and ending of his plea *petere judicium de brevi*; but otherwise in the conclusion only. Heath's Max. 22.

¶ Pleas to the action of the writ are where, by the plaintiff's own declaration, or the defendant's plea, it appears that the plaintiff ought not to have the same, but another writ. And as 26 H. 8. Brook, Brief 409. the defendant may choose either to conclude to the writ, or to the action of the writ. And so 9 Ed. 4. 21. where dower was brought against a guardian; and he said, he was not guardian, judgment de brevi. Heath's Max. 22, 23.

*Contra* where the tenant answers in the affirmative, there the demandant shall answer with a negative. Br.

*Ibid.*—As the tenant pleads jointenancy with a stranger, judgment of the writ, the demandant shall say that he is sole tenant as the writ supposes. *Abque hoc* that the stranger any thing bar. Br. *Ibid.*—And so see that where a negative goes before, the affirmative subsequent shall make a perfect issue. Br. *Ibid.*

4. Where the tenant answers in the negative, as *nontenure*, or in *præcipe* against two, the one takes the entire tenancy, and vouches *abique hoc*, that the other any thing has; in those and the like cases the defendant may maintain his writ in the affirmative without traverse; for traverse shall not be upon traverse, and if one traverses it is sufficient. Br. Traverse per &c. pl. 130: cites 9 E. 4. 36.

See Freight (F) pl. 5.

(D) Plea not answering the Declaration, and where it does or may vary from it.

1 IN trespass, the defendant justified in three acres; the plaintiff said that the place is three acres, and 20 acres more; and because the defendant did not justify in the 20 acres, he demanded judgment and his damages; and good pleading. Br. Pleadings, pl. 40. cites 7 H. 6. 3. 4.

S. F. For the manor is entire, and by this he shall recover the whole manor. Br. *Præcipe quod reddat*, pl. 14. cites S. C.

2. A demand was of the manor of B. where it extended into B. and C. and yet well; nota. Br. Demand, pl. 28. cites 4 E. 4. 15.

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If the manor of B. extends into B. and S. and is demanded by

the name of the manor of B. in B. he shall recover only that which is in B. But some e contra, and that foreprise shall be made. *Quære*. Br. Demand, pl. 50. cites 9. E. 4. 17.

And that if the plaintiff is of an acre of land, the tenant may say that it is an acre of wood. Judgment of the plaintiff. *Ibid.*—But per Vavifour and others, the plaintiff shall not say that the tenements are other than the tenant has said. *Ibid.*

4. In assise, the plaintiff was of a rent out of a house, and the tenant said that it is an acre of land which is put in view; judgment if the plaintiff shall say that 'tis a house: and per Townfende, Sulyard, Brian and Catesby, the tenant may vary from the plaintiff as above, because the plaintiff did not shew what thing shall be charged. Br. Pleadings, pl. 68. cites 2 H. 7. 4.

S. C. Goldf. III. pl. 18. by the name of ROOKER v. GOMERSALL, and says that the word *prædict.* was also omitted.

5. In debt against A. and M. his wife, executrix of J. S. of L. taylor, the defendants plead a recovery against them by W. R. by the names of G. and M. his wife, executrix of J. S. of L. barber-surgeon, and that ultra that sum they had nothing &c. Upon demurrer it was adjudged no plea, because they took no averment that J. S. taylor and J. S. barber-surgeon were the same person. Cro. E. 127. Hill. 31 Eliz. B. R. Hooper v. Gomerfial & uxor.

6. In an action of *assault and battery*, and declared that *he so threatened his life that he dared not go about his business*. The defendant pleaded *son assault* in bar, and said nothing as to the threats. This was held good on error brought; and judgment was affirmed, because the mentioning the threats was only to *increase of damages*, and was not the *substance of the action*. Mo. 704. 705. pl. 983. Penruddock v. Errington.

*In trespass for battery of his servant, per quod servitium amittit. The defendant justified the battery, as in defence of his possession, but said nothing as to the loss of service.* Upon a demurrer, Bridgman thought the plea not good, and that this was no answer to the declaration, by reason of the saying nothing to the loss of service. But Houghton e contra, because the *loss of service is only a consequence of the battery*, so that the justifying the battery is a sufficient answer to the loss of service, the battery being the principal. And of this opinion was Coke Ch. J. The plaintiff had judgment. Roll. R. 393. Trin. 14 Jac. B. R. Norris v. Baker.

7. An *ejectment* was brought as of a lease of land at common law, and the plea of the defendant proved that the land was copyhold. And adjudged for the plaintiff that the plea is ill; for there is not any confession and avoidance of the lease alledged by the plaintiff. Cro. E. 728. Mich. 41 and 42 Eliz. C. B. Kenley v. Richardson.

8. An action was brought for *trespass cum equis, bobus, vaccis &c.* The defendant justified for two horses, and said nothing of the residue. This was held ill, and judgment for the plaintiff. Cro. J. 27. Pasch. 2 Jac. B. R. Thorne v. Lassels.

*Trespass was alleged with a continuando to the 25th of June. The defendant justified from the 8th of May to the aforesaid 25th of June, and so says nothing of the four last days. This was held ill, and judgment for the plaintiff. Cro. J. 27. Thorne v. Lassels.—So trespass was brought for entry into house and lands. Defendant pleaded a lease of the house, but said nothing as to the lands mentioned in the declaration; and it was adjudged for the plaintiff. Cro. J. 204. Hill. 5. Jac. B. R. Stodden v. Harvey.*

9. In *trespass for breaking his close, and carrying away two cart-loads of timber*; the defendant made title to the close &c. and that he took the timber; plaintiff demurr'd because defendant said nothing to the two load of timber; for the declaration did not set forth that the timber was growing on the land, neither did the defendant say that it was, nor has he justified the taking it for damage feasant. And because neither plaintiff or defendant shewed that the timber was growing on the land, Haughton J. said that the plea is no answer as to the timber; quod fuit concessum per tot. Cur. Roll. R. 406. Trin. 14 Jac. B. R. Dense v. Dense.

10. *Trespass* was brought of *assault, battery and imprisonment*, on the last day of October 6 Car. at W. &c. The defendant justified by a warrant from the sheriff on a supplicavit, and that thereupon he arrested the plaintiff the 21st September &c. Exception was taken, that the plea did not answer the time in the declaration, viz. the last day of October, neither by answer nor by traverse. But it was answer'd, that the justification was of an act in the same county, and justified all the time in the declaration; and therefore, tho' it agrees not with it in the day, but concludes quæ est eadem transgressio, is good enough, the day not being material.

And where the defendant pleaded that transgressio, inquit, &c. prædictæ were done at such a day in such a year, and which were very different from

those in the declaration, exception was taken that the plea in bar was ill, by not answering to the battery. But to this it was answered, and so resolved by the Court in Hill. Term next following, that *transgressio prædicta* is an answer to the whole. L. v. 31. Pasch. 11 Car. 2. B. R. *Prideaux v. Webber*.—S. P. and it was held by the Court to be good enough, either if it be considered that in battery the time is not material, and therefore the plaintiff may lay it at any time, and so, tho' the defendant justifies another day, it shall be intended the same battery; or else, there being that word (*prædict.*) to the day and year of the King mistaken, it shall be surplusage and void. *Freem. Rep. 212. Mich. 1676. C. B. pl. 219. Anon.*

So where the defendant justified the detaining by virtue of a recovery for a less sum, and said nothing as to the residue, it was looked upon as a fault incurable. *Sed adjournatur. Freem. Rep. 63. 64. Mich. 1672. Colkley v. Jackson.*

11. In an action of assault, battery and imprisonment, till the plaintiff had paid 11 l. 10 s. the defendant pleads and justifies by reason of an execution, and a warrant thereupon for 11 l. and doth not mention the 10 s. And upon demurrer for this cause judgment was given for the plaintiff upon the first opening, because it appeared the defendant took more than was warranted by the execution. 2 Mod. 177. Hill. 28 & 29 Car. 2. C. B. *Harding v. Ferne*.

12. In debt upon a bill obligatory, the plaintiff set forth the condition, that if within three months it should sufficiently appear before the Lord B. &c. that a horse called Cripple was not his proper horse, that then the defendant would do so and so; and said that within the three months it did sufficiently appear to the Lord B. &c. that the horse called Cripple was not his proper horse. The defendant pleaded that the horse called Cripple was his proper horse. It was resolved that the plea in bar was insufficient, and no answer to the declaration. 3 Lev. 240. Mich. 1 Jac. 2. C. B. *Beayne v. Beal*.

13. In trespass for taking a cow, and the justification is of taking of a heifer; and judgment for the plaintiff, because the bar does not answer the declaration. *Lutw. 1355. Hill. 2 & 3 Jac. 2. Mellor v. Bocking*.

14. In replevin for taking bona catalla & averia &c. the defendant made cognizance for the taking of averia only, for that a rent-charge of 100 l. per ann. was granted out of the lands &c. payable half-yearly at Michaelmas and Lady-day, and 33 l. parcel of 50 l. for half a year's rent being behind and unpaid, he distrained; and so justifies the taking, and inde petit judicium & return. averiorum bonorum & catallorum prædict. Upon a demurrer to this avowry, it was held to be insufficient, because he did not shew when the other 17 l. was paid to make up the half-year's rent; besides, the action was brought for taking bona catalla & averia, and defendant avowed the taking of averia only, which [ 382 ] is an answer only for the live cattle, and not for the whole: and for these reasons the plaintiff had judgment. 4 Mod. 402. Hill. 6 W. & M. B. R. *Hunt v. Braines*.

(E) *At what Time Defendant must plead.*

1. *DEBT* upon obligation of 20 l. against executor; the defendant pleaded *Plene administravit*, and so to issue; and at the *Nisi Prius* when the \* jury appeared, the defendant said that this inquest ought not to be taken; for after the last continuance the plaintiff had recovered 10 l. parcel of the demand at D. in the county of E. Judgment of the writ; which plea was recorded by the Justices, and the inquest discharged; quod nota, at the day of the *Nisi Prius*. Br. Jours, pl. 50. cites 5 E. 4 138. \* Orig. (jour).

2. Defendant cannot plead before declaration made in any case. Br. Dette, pl. 171. cites 21 E. 4. 37. Per Pigot. Not before declaration entred, quod nota bene inde. Br. Count, pl. 70. cites S. C.

3. If the defendant doth not plead according to the rules of the Court, so that the plaintiff may enter judgment upon a *nil dicit*, yet if after the rules are out, the defendant do put in his plea into the office before the plaintiff hath entered his judgment, this plea is to be accepted, and the plaintiff ought not then to enter his judgment; and therefore it behoves attornies to be vigilant in their practice. 2 L. P. R. 298. tit. Pleas &c. cites 21 Car. B. R. & Hill. 23 Car. For a judgment upon a *nil dicit* is for want of plea, but in this case here is a plea, and if such a judgment should be entered, it would be

in fact a false and irregular judgment; and therefore the Court will not suffer him to enter it, 2 L. P. R. 298, 299. tit. Pleas &c.

4. When the Court doth order one to plead forthwith, it is to be understood that he shall plead in such convenient time after as the Court shall judge reasonable; but if it be *instante*, then he must plead the same day. Mich. 22 Car. B. R. For the law accounteth things which are done in convenient time to be done without delay. 2 L. P. R. 300. tit. Pleas &c.

5. If the defendant will plead a *dilatory plea*, he must plead it upon the giving of the first rule in the office for the defendant to plead, and he must plead a plea in chief after the second rule given in the office for the defendant to plead; and this is the reason that judgment cannot be entered against the defendant for want of a plea until the time given by the two rules to plead be past. Mich. 24 Car. B. R. But if he then put in a dilatory plea, the plaintiff may move the Court for him to plead as he will stand to it. 2 L. P. R. 309.

6. If the plaintiff's attorney deliver an imperfect declaration to the defendant's attorney, and he accepts of it, yet he is not bound to plead until the plaintiff hath perfected his declaration. Mich. 1649. B. S. Pasch. for until it be perfected it is no declaration; but he may well demur if he thinks fit, which is the usual practice. 2 L. P. R. 310. tit. Pleas &c.

7. If an action be brought in the Sheriff's Court in London, or Marshal's Court in Southwark, and be afterwards removed by *habeas* For the Court will not grant

the party to take any advantage by the removing the Cause hither, to delay the other party in the course of his proceedings, which would be, if he should not be compelled to plead the same Term the Cause was removed; also he is supposed to have sufficient notice of the cause of action, that appearing in the plaint levied in the inferior Court, so that he may have time enough to provide for his plea during the bringing of his habeas corpus and his putting in of bail, and the plaintiff's declaring and giving of rules to plead. 2 L. P. R. 311.

[ 383 ] 8. If a declaration be delivered to the defendant's attorney, or put into the office after the *Essoign* day of the Term, the defendant cannot be compelled to plead to try it that Term; but he ought to plead to enter. 2 L. P. R. 314. cites 1652. B. S.

For the Term was begun when the declaration was delivered, and it cannot be accounted, a declaration of the preceding Term; for the *Essoign* day is part of the Term. 2 L. P. R. 314. tit. Pleas &c.

9. It was agreed by Glyn Ch. J. Trin. 1657. that if one be sued in an action of trespass and *ejectment* by original, he needs not to plead until the original be shewed him, if he hath demanded oyer of it before the rules are out. 2 L. P. R. 299. tit. Pleas &c.

S. P. 2 L. P. R. 301, 302. — It must be actually a Term's notice, and not by acceptance of law only. 6 Mod. 57. Mich. 2. Ann. B. R. Lefault v. Dyer.

10. If a Cause doth continue four Terms without prosecution before issue joined, the defendant is to have a Term's notice to plead &c. before judgment can be entered by default; if after issue joined, a Term's notice of trial. Per Magistrum Livesay & al. &c. Pasch. 21 Car. 1. 2 L. P. R. 236. tit. Notice.

11. If a man be bound by recognizance to appear the first day of the Term, and is charged upon his appearance with an information, in case the information be laid in *Middlesex* the party has time to plead during all that Term, so that it cannot come to trial in the Term; but in case it be laid in any other county, the party shall have time to plead till the Term; for he is as much concerned to defend himself in those cases as in any civil action; and since the law allows him counsel, the law allows him time likewise to consult with them; for not to allow the means of defence, is to take away the subjects defence; otherwise it is of capital offences: but note, in these cases there is no counsel. 2 Salk. 514. Mich. 1 W. & M. B. R. Anon.

A difference has been taken, that if one comes in upon a *cepi* corpus in custody, he must plead instantly; *scilicet* where he has been bailed and comes in upon the *cepi*; but sure there is no reason for this difference; for the return is the same in both cases; and the party ought not to be the harder used because he could not find bail; per Holt. 12 Mod. 372. Pasch. 12 W. 3. Anon.

12. Also where the party comes in by *cepi corpus*, or upon an outlawry, he shall plead presently, for then he has been guilty of a contempt; per Cur. contrary to the Case of the 7 bishops. 2 Salk. 514. Mich. 1 W. & M. B. R. Anon.

So in *Easter* Term, if the declaration be delivered before *crastinum animarum*, the defendant must plead to try; but upon a *cepi corpus* he is only to plead to enter. 2 Salk. 515. Mich. 8 W. 3. B. R. Hall v. Eggleston.

13. Upon a habeas corpus returnable in *Michaelmas* Term, if the declaration be delivered before *crastinum animarum*, the defendant must plead to try; but upon a *cepi corpus*, to enter only. *Ibid.*

14. Upon

14. Upon a declaration filed against a prisoner or a privileged person, the defendant shall have liberty to plead in abatement at any time during the 8 days rule: but where a declaration is delivered or filed before Essoign day of the Term, there the defendant must plead in abatement within the first 4 days of the Term, and not after the end of 4 days whether rules are given or no. 2 L. P. R. 320. tit. Pleas &c. cites Mich. 8 W. 3. B. R.

15. If a declaration be delivered against one in custody, he shall have the whole Term to plead in abatement. 2 Salk. 515. Mich. 8 W. 3. B. R. Anon.

16. If judgment in ejectment be signed in country cause for want of a plea, but no possession delivered, a Judge in his chamber at any time before the assises may compel the plaintiff to accept a plea; but if possession be delivered, he is without remedy; per Holt Ch. J. 2 Salk. 516. Mich. 9 W. 3. B. R. Anon.

17. It was mov'd for an imparlance till the next Term, because the defendant was an officer of the Court, and the bill was not filed against him, so as to give him 8 days within Term to plead; but the Court held, that the day of the bill filed is one day, so that the plaintiff may give rules that day; also they agreed, that Sundays and Holidays are to be reckoned in; and the Clerks said, it was sufficient that he had four days in Term; quod Curia concessit. 2 Salk. 517. Trin. 11 W. 3. B. R. Pasmore v. Serjeant Goodwin. [ 384 ]

18. Mr. Clerk said, that anciently there were two rules given, both four-day rules; the 1st was, *Ad respondendum*; the 2d, *Ad respondendum peremptorie*; which two were now turned into one 8 days rule. 2 Salk. 517. Trin. 11 W. 3. B. R. Pasmore v. Serjeant Goodwin.

19. In a common action of trespass, the plaintiff signed his judgment for want of a plea; the defendant after Term and before the Assises offered him a special plea, or to plead the general issue, provided the plaintiff would consent to enter into a rule, that he should at the trial be allowed to give special matter in evidence; the plaintiff refused, and executed a writ of enquiry: and now it was moved, that upon paying costs the judgment might be set aside, and the plaintiff obliged to accept the plea and go to trial, the plea being fair and containing special matter of title. The motion was granted; for per Holt Ch. J. where the defendant's plea was a fair plea, and no delay affected, we will interpose; otherwise where a plea contains special matter that is questionable, and was designed to draw the plaintiff to demur. 2 Salk. 518. Pasch. 12 W. 3. B. R. Wood v. Cleveland.

20. There was a question if a man appears voluntarily before *menssem Pasche* in Easter Term, whether he be obliged to plead to enter? Sir Samuel Astrey and Mr. Clark were of opinion he was not. But per Holt Ch. J. there is no difference between a voluntary appearance and an appearance upon a *cepi corpus*; for a voluntary appearance is not good, unless a writ has been

taken out; and there is no reason for it; for if the plaintiff be content with a voluntary appearance in case of the defendant, there is no reason why the plaintiff should be in a worse condition than if he had arrested him: let the rule be, if a writ be taken out, and the defendant agrees to appear, he shall appear and plead according to the return of the writ, and if the return be before *menssem Pasche*, he shall plead to enter; but if no writ were taken out he shall not be obliged to appear; but if a writ were taken out returnable after *menssem Pasche* he shall have an imparlance till next Term. 2 Saik. 518. Trin 12 W. 3. B. R. Anon.

21. In the Court of Common Pleas, upon a special *capias* issued forth, with the cause of action therein expressed, the defendant is, by the rules of that Court, to appear and plead in one and the same Term. But it is not so in the *King's Bench*, where the suit commenced by bill; for there he hath liberty to imparl to the next Term. But the practice is the same in the *King's Bench* with that in the Common Pleas where the action is by *original*: and the reason of it is, that when it is by special *original*, the declaration is comprised in the writ, which is not so in a *latitat*. L. P. R. 86.

22. If one be sued upon an obligation, he cannot be compelled to plead before he hath *oyer* of the condition of the obligation, and a copy (if required) to be made at his own charges, because he cannot tell what to plead till he knows for what he is sued. 2 L. P. R. 323.

23. If one be sued by *original writ*, he must plead the same Term in which the *original* is returned; if the defendant be arrested by a *capias* containing in it the cause of action exactly as the *original* is, if such *capias* be returnable the same Term with the *original*; but whensoever the *capias* is returnable, the defendant must plead within four days if required; and the reason thereof is because the special matter is contained in the writ whereof the defendant has notice upon the arrest. 2 L. P. R. 324.

[ 385 ] 24. But it is not so where one is sued by *latitat* or bill of *Middlesex*; for if they be de placito transgres. yet the plaintiff may declare in debt or what other action he will: but in the other case the declaration must not vary from the writ; if it does, the defendant may plead in abatement. 2 L. P. R. 324.

25. If a declaration be delivered the day before the last day of a Term, the defendant has 2 days in the next Term to put in an answer; for he ought to have 4 days in Term; per Cur. 12 Mod. 231. Mich. 10 W. 3. Anon.

26. Judgment and execution thereupon were set aside, because the plea was put in before judgment signed. 12 Mod. 248. Mich. 10 W. 3. Baker v. Chandler.

27. If *scire facias* be returned served, and the defendant has an act of parliament for his discharge, and omits to come and plead it, he has for ever lost the advantage of it; per Cur. 12 Mod. 441. Hill. 12 W. 3. Anon.

28. Those

28. Those that come in on a \* *habeas corpus* or attachment must plead the same Term without imparlance, giving the ordinary rules, which are 8 days; per Aston. Cumb. 3. 1 Jac. 2. B. R.

\* S. P. In regard of the delay and extraordinary charge the Car. B. R.

plaintiff hath been put unto by so bringing him in. 2 L. P. R. 298. cites 21

29. Where a man is brought in custody to answer an *information*, he must plead *instantly*. So upon an *attachment*, if non est inventus be return'd, he must plead *instantly*; but if he is not taken, but comes in voluntarily before the return of the writ, it seems otherwise; per Sir Sam. Asty. Cumb. 310. Hill. 6 W. 3. B. R. Hains's Case.

30. The question was, what time the defendant has to plead after appearance to the *exigi facias*? The Court held, that he must plead *instantly*. And tho' it was objected, that if the appearance were to an *exigi facias* returnable the last return of any Term, the defendant would have no opportunity of applying to the Court to bring in money, change the venue or other matter; but in answer to that it was said, that the defendant might, if he had any reason, apply to a Judge for relief, but that the Court would not without manifest reason delay the plaintiff after the defendant had stood out so many processes. Rep. of Pract. in C. B. 18. Mich. 6 Geo. 1. Aplin v. Chambers.

31. It was held by the whole Court, that a plea in *abatement* is void if not delivered within 4 days after declaration delivered or left in the office, tho' no rule to plead be given. Rep. of Pract. in C. B. 23. Trin. 7 Geo. 1. Anon.

32. A motion was made the last day of the Term to plead *ancient demesne*, but denied, because it was not moved within the time limited to plead in *abatement*, viz. within 4 days after declaration delivered or left in the office. Rep. of Pract. in C. B. 43. Hill. 1 Geo. 2. Holdfast v. Carlton.

S. P. Notes in C. B. 242. Tria. 10 Geo. 2. Pease v. Badtill.

33. A motion was for an *imparlance* till Michaelmas Term next because the declaration was delivered last Michaelmas Term, and no plea called for in 3 Terms, according to the rule Mich. 1654. which was ordered by the Court accordingly. Rep. of Pract. in C. B. 57. Trin. 3 Geo. 2. Cole v. Pinnell.

34. It is ordered, that upon all *process* sued out of this Court, returnable the first or second return of any Term if the plaintiff declares in London or Middlesex, and the defendant lives within 20 miles of London, the defendant shall plead within 4 days after such declaration delivered without any *imparlance*; and such declaration may be delivered *de bene esse*. And in case the plaintiff declares in any other county, or the defendant lives above 20 miles from London, the defendant shall plead within 8 days after the declaration delivered, without any *imparlance*; and in default of pleading as aforesaid, the plaintiff may sign his judgment. Rules &c. in C. B. Mich. 3 Geo. 2. 1729.

Judgment was signed before the expiration of eight days after declaration delivered to the attorney, the defendant living above twenty miles from London. The Court said

it was their intent that the late rules should extend to declarations delivered to attorneys as well as to declarations filed in the office *de bene esse*, and notice thereby delivered to defendants; and set aside the judgment. Rep. of Pract. 94. Mich. 7 Geo. 2. Laxsonby v. Bradley.—

A motion

A motion to set aside a judgment, because the plaintiff did not *stay four days* for a plea after the eight days for appearance were expired, but signing his judgment the same day that he entered the appearance for the defendant, which was the 9th day; but it appearing that the declaration had been *de bene esse*, and that the rule to plead was out before the appearance entered, the Court denied the motion. Rep. of Pract. in C. B. 95. Mich. 7 Geo. 2. Charlton v. Hankey & Alfop.

Ibid. cites  
Mich. 1743.  
S. P. Taylor  
v. Sleham.

35. A motion was to set aside a judgment signed the morning next after the day given by a Judge's order for time to plead. The Court were of opinion, that the day given by the Judge must be intended a whole day, and that this was enlarging the rule to plead one whole day, and therefore plaintiff could not sign his judgment till the opening of the office in the afternoon of the next day after the day given by the Judge was expired. Rep. of Pract. in C. B. 67. Mich. 4 Geo. 2. Herne v. Chapman.

Rep. of  
Pract. in  
C. B. 103.  
S. C.

36. In ejectment; declaration was of Easter Term to appear in Trinity. It was moved to be at liberty to plead ancient demesne. A rule was made to shew cause; upon shewing cause it was insisted for plaintiff, that the plea being to the jurisdiction of the Court is a dilatory and ought to have been pleaded within the first four days of this Term; and of that opinion were the Court, and discharged the rule. Sir George Cooke quoted 2 cases in point determined in this Court, \* HOLDFAST v. CHARLTON, Hill. 1 Geo. 2. and BINGHAM v. BARKER, Trin. 2 Geo. 2. Notes in C. B. 232. Trin. 7 & 8 Geo. 2. Smith v. Roe.

\* Rep. of  
Pract. in C.  
B. 43. S. C.

37. The plaintiff having entered an appearance for the defendant according to the late statute filed a declaration against him, and gave a rule to plead, and some days after served the defendant with notice of the declaration; the Court held that the rule was irregular, for it should not have been given till after the notice was served, the declaration being well delivered from the time of notice only. Rep. of Pract. in C. B. 111. Mich. 8 Geo. 2. Grey v. Sanders.

S. C. cited  
Rep. of  
Pract. in  
C. B. 79.—  
S. P. Ibid.  
78. Mich.  
6 Geo. 2.  
Threlkeld  
v. Good-  
fellow.

38. The declaration was of Michaelmas Term last past, and the defendant pleaded in abatement the fourth day within Hillary Term then next, without a special imparlance. Plaintiff demurred to the plea, and defendant joined in demurrer; whereupon plaintiff made up the book with a general imparlance, and the Cause was set down in the paper to be argued. It was moved for the defendant, that the general imparlance might be struck out of the paper book; insisting that the first four days of Hillary Term were ex gratia, and that defendant might then plead as of Michaelmas Term before. The motion was opposed by plaintiff, and no rule was made; the Court declaring that in this case the defendant could not plead in abatement without procuring special imparlance. Notes in C. B. 238. Mich. 9 Geo. 2. Napper v. Biddle.

39. Rule to shew cause why defendant should not have leave to plead a tender as of last Term, notwithstanding the general imparlance given by plaintiff. Objected by plaintiff's attorney, that defendant ought to have applied on the first day of the Term. Per Cur. he comes time enough within the first four days. Rule absolute in the Treasury. January 27. Notes in C. B. 252. Hill. 12 Geo. 2. King v. Nichols.

40. Defendant moved that plaintiff may insert *the true day of filing bill* (viz. February 3. last) in the memorandum at the head of his declaration, and that defendant might have leave to plead a tender of last Term, the declaration not having been delivered till after the Term. The rule to shew cause was made absolute on hearing counsel on both sides. Notes in C. B. 253. Easter 12 Geo. 2. Potts v. Creswell attorney.

41. As to rules to be observed in C. B. in the proceedings upon declarations against prisoners in county gaols; and in what time they must plead after declaration delivered. See Rules &c. in C. B. Easter 5 W. 3.

(F) *What Plea may be pleaded after Time to plead* [ 387 ]  
*granted.*

1. ON a motion for time to plead, the Court refused to grant time, but on terms that the defendant should consent not to move the Court to change the venue. Rep. of Pract. in C. B. 57. Trin. 3 Geo. 2. Sabor v. Pott. S. P. Ibid. 4 Geo. 2. Treasure v. Wright.

2. Defendant had obtained an order for time to plead, pleading an issuable plea &c. and afterwards pleaded in bar to the plaintiff's action (*which was upon a simple contract*) a judgment confessed upon a bond since the order for time to plead made. Plaintiff moved to set aside the plea; but the Court, upon hearing counsel on both sides, were of opinion, that as there was no particular restraint in the order, and as the bond (whereupon the judgment was confessed) might have been pleaded in bar to this action, the plea must stand. Notes in C. B. 231. Easter 7 Geo. 2. Hughes v. Pellet administrator.

3. A motion was for leave to add the general issue to a plea of non assumpsit infra sex annos, and this was moved after a demurrer to the plea. The Court discharged the rule to shew cause, for they said a defendant cannot add to his plea after a replication or demurrer. Rep. of Pract. in C. B. 114. Hill. 8 Geo. 2. Pierfon v. Ives.

4. Defendant was allowed time to plead, he pleading an issuable plea. Thereupon he pleaded a tender; the plaintiff after this plea delivered sign'd judgment; the defendant moved to set the judgment aside; but because a tender is no issuable plea within the meaning of this rule, the judgment was held good. See Rep. of Pract. in C. B. 134. Mich. 10 Geo. 2. Davershill v. Barret.

5. A regular judgment was set aside, and the defendant had leave to plead an issuable plea, but he pleaded the statute of limitations. The plaintiff moved to set aside that plea, and it was granted; for where the defendant has had an opportunity of pleading the statute, but lets judgment go by default, and afterwards applies to set aside that judgment, he shall not be let in but upon payment of costs, and pleading the general issue.

Notes in C. B. 243. S. C. by name of Davenhill v. Barrit.

Rep. of Pract. in C. B. 139. Hill. 10 Geo. 2. *Leaver v. Whicher*.

6. After a Judge's order for time to plead, pleading an *issuable* plea, defendant moved to plead *double matter*; and the question was, whether a rule for that purpose ought to be granted or not? the Court took time to consider, and after conferring with the Judges of the other Courts, gave defendant leave to plead doubly, pleading *issuable* pleas, and taking short notice of trial. Notes in C. B. 244. Mich. 10 Geo. 2. *Leighton v. Leighton*.

(G) *Helped or aided by the plea, What is. Writ.*  
Declaration.

1. IF a man pleads over, he shall never take advantage of any slip committed in the pleading of the other side, which he could not take advantage of upon a general demurrer; per Holt Ch. J. 2 Salk. 519. pl. 18. Trin. 13 W. 3. B. R. Anon.

[ 388 ] 2. The defendant pleads that the plaintiff had a co-executor, who was in life and had released to him; and upon this they were at issue, and found for the plaintiff; and awarded he shall recover, because the defendant might have abated, the action being brought by the plaintiff alone, and had waved it. Cro. El. 69. cites 9 Ed. 4.

3. *Trespass of beasts taken*, the defendant said, that B. held the land where &c. of him by the services &c. which B. leased to the plaintiff for years, and for so much arrear he distrained; the plaintiff said, that *riens arrear*, and so to issue, and found for the plaintiff &c. and the defendant pleaded in arrest of judgment; because it appears that the plaintiff by his plea of *riens arrear* has confessed the tenure, and then cited the statute of Marlebridge cap. 3. that the lord shall therefore not be punished by redemption; and by the opinion of all the Justices, for this cause, and also because it appears by their consufance in pleading, that the defendant is lord, and so the writ shall not be vi &c. armis, and the affirmance of it by pleading shall not aid, but the Court ought to abate the writ. Br. Repleader, pl. 36. cites 10 E. 4. 7.

4. In debt, the plaintiff counted upon a lease for term of years, the defendant traversed the lease, upon which they were at issue, and after, the defendant confessed the action, and then pleaded in arrest of judgment, inasmuch as the plaintiff has not counted at what place the lease was made, and so *jeofail*, and yet the plaintiff recovered by judgment; for the defendant has pleaded in bar, and denied the lease, so the count is good. Br. Repleader, pl. 38. cites 18 E. 4. 17.

As where a man pleads release and shows no place where it was made, and the plaintiff replies that *Non est factum*, the replication has made the plea good. Ibid.

5. In detinue, it was said by Pigot and Chocke for law, that: of *jointenancy, several tenancy, misnofiner, taking of baron pending*

*pending the writ &c. which proves the writ only abatable*, there if the party pleads other matter, and admits the writ, he shall not have writ of error thereof after; contra of death of the defendant pending the writ, he shall have error after; for by this the writ was abated in fact. Br. Error, pl. 176. cites 18 E. 4. 19.

6. *Debt upon two obligations*, of which one was not then forfeited, for the day of payment was not come; the defendant pleads to that a release, and took no advantage of it, that it appeared it was not forfeit; and to the other he pleaded another plea; and upon both they were at issue; and found for the plaintiff. And this matter was alledged in arrest of judgment that it did appear upon the obligation shewn, that the day of payment was not yet come; and so the plaintiff is not to have judgment upon it. But it was adjudged for the plaintiff for both, because the defendant might have taken advantage of it, but did not, but waved it, and pleaded a collateral matter which was found against him. Cro. El. 68. Mich. 29 and 30 Eliz. B. R. Frith's Case.

7. It has always been agreed for law, that if *debt or trover &c.* be brought for a moiety, and the defendant who is a stranger pleads *nil debet*, this makes the declaration good. Per Twifden J. Sid. 49. Mich. 13 Car. 2. B. R. in Case of Cole v. Banbury.

8. *Trespass for taking his goods*. The declaration is not good without saying that they were in possession of the plaintiff, or calling them *sua*: but defendant pleading that he took them out of the hands of the plaintiff, and delivered them to the constable &c. has made the declaration good, so that plaintiff may well maintain this action upon his possession, without any property. Sid. 184. Pasch. 16. Car. 2. B. R. Brook v. Brook & al.

9. A. is possessed of Black-acre, to which B. has no manner of right, and A. desires B. to release him all his right to Black-acre, and promises him in consideration thereof to pay him so much money; sure this is a good consideration and a good promise; for it puts B. to the trouble of making a release. And tho' the want of averment, that a release was made, would have been bad, if demurr'd to, yet it is now help'd by going over and pleading. Per Holt Ch. J. 12 Mod. 459. Pasch. 13 W. 3. in Case of Thorp v. Thorp.

So in debt upon indentures, in which there was a penalty, wherein the defendant did bind himself, if he [ 389 ] did not perform

all the covenants in the said indentures; and regularly in such cases the way is for the plaintiff to set forth the indentures, and to assign breach of one of the covenants in certain; and in debt for the penalty, he said generally that the defendant had broke all the covenants in that indenture, without shewing any one in certain; the defendant pleaded a collateral matter in bar; and adjudged the declaration had been bad on demurrer, but that the plea over-ruled it, tho' the breach was double and uncertain. 12 Mod. 466. in Case of Thorp v. Thorp.—Cites 3 H. 6. 8. 9 H. 6. 16, 19. and that it was so adjudged in B. R. Pasch. 23 Car. 2. Bernard v. Mitchell. 1 Vent. 114. S. P. 12 Mod. 459. in S. C.

So if one covenants that if J. S. does such and such things, he will pay him so much money. J. S. brings action, and says generally that he performed all the things; this would be bad on demurrer; but curable by pleading over. Per Holt Ch. J. 12 Mod. 459. Pasch. 13 W. 3. in Case of Thorp v. Thorp.

10. Where the thing in its own nature requires a demand, a Cro. C. 76. bond for doing thereof is not forfeited till demand. And in that case

C. B. Chapman v. Chapman.

ease the defendant must take advantage of the want of demand by pleading that he was always, and still is ready to pay it; for if he plead *performance generally*, and plaintiff assigns a breach in his replication, the defendant shall not rejoin and allege want of demand; for that would be a departure; per Gould; quod Holt concessit. 12 Mod. 414. in Case of Levins v. Randall.—Cites 1 Cro. 76. 77.

11. Error of a judgment in the Court of Canterbury; exception was taken that it does not appear that the jurisdiction of the Court was co-extensive with the city, and they alleged the cause of action only to have arisen within the city; but it was said that the defendant coming in and answering had waved that advantage. 12 Mod. 536. Trin. 13 W. 3. Lancaster v. Lovelace.

12. Debt by administrator *cui administratio debito modo commissa fuit*; defendant pleads over. Per Cur. This had been bad if demurr'd unto, but is now helped by your pleading over; for you thereby admit he has a right of suit, and is administrator. 12 Mod. 537. Trin. 13 W. 3. Hall v. Bond.

### (H) Amendment or Alteration of Pleas. In what Cases.

1. **A**SSISE against a man and a woman; the woman pleaded in bar, and the man to the writ, that the woman was his feme not named feme; and they were adjourned upon the plea of the feme, and at the day the man confess'd the writ good, and his plea false, and so he may. Per Cur. Br. Assise, pl. 250. cites 23 Aff. 4.

2. *Trespass upon the statute of forcible entry*; the defendant intitled himself to an estate for term of life, and prayed aid of the King because he in reversion was within age, and in ward of the King, and had aid, but not de rigore juris; and after proceeding the defendant pleaded Not guilty, and had the plea, notwithstanding his justification before; quod nota. Br. General Issue, pl. 18. cites 22 H. 6. 18.

S. P. Br. Forcible Entry, pl. 6. cites 22 H. 6. 17.—

3. And it is said elsewhere, that in assise and trespass after special plea pleaded, and replication made, yet the defendant may waive them and plead the general issue; quod nota. Ibid.

In assise the tenant pleaded in bar, upon which they were at issue, which was entered, and yet the defendant came \*after and wav'd the issue and took the general issue, and the waving the first issue was enter'd of record. Br. General Issue, pl. 54. cites 34 H. 6. 29.—\* At another day and in another term. Br. Issues joins, pl. 76. cites S. C.

S. P. Br. Pleadings, pl. 119. cites [ 390 ] 2 E. 4. 13. And it shall be before the plea entered.

4. In detinue 'twas agreed that he who pleads a bar may after relinquish it and plead the general issue in any action: and per Danby Ch. J. he may wage his law, and relinquish the bar, and so he did there. Br. Bar, pl. 79. cites 2 E. 4. 14.

5. In formedon the tenant vouched A. who entered into the warranty, and vouched B. and the demandant, as to the third part

part counter-pleaded the warranty, and to the rest granted the voucher, by which the process issued against the vouchee, and against the inquest, and at the day the first vouchee pleaded the entry of the demand into part after the last continuance; and therefore the inquest was discharged, and new issue taken upon this matter; for by the new issue the first issue is waived. Br. Inquest, pl. 38. cites 5 E. 4. 116.

6. In ward the plaintiff surmised that the ancestor of the infant died in his homage; the defendant shewed a gift in tail to the ancestor of the infant *absque hoc* that he died seised in fee; and it was debated if he shall traverse the dying seised in his homage or not, and at the end of the Term the defendant would have amended his bar; and the Court would not suffer it. And Vavisor who was with another defendant would have changed his paper; and the Court would not suffer it. Br. Office del. &c. pl. 30. cites 2 R. 3. 13.

7. The defendant may amend his plea, although it be *three Terms* after it was pleaded, if it be not entered, and he will pay costs. Mich. 22 Car. B. R. But it must be by leave of the Court, because it is against the common rules of practice; which they will grant if there be cause for it. 2 L. P. R. 300.

S. P. If it be but in paper and not entered. Hill. 23 Car. B. R. For it is not

reasonable that the Court should grant him favour to the prejudice of the party, who by this amendment is put to new trouble and charge; but if the plea be entered in parchment, and the record made up, the Court will not give leave to amend it. 2 L. P. R. 306.

Since pleading in paper is now introduced, instead of the old way of pleading ore tenus at the bar; it is but reasonable, after a plea is issue, or demurrer joined, that upon payment of costs the parties should have liberty to amend their plea, or to waive their plea or demurrer while all the proceedings are in paper. 2 Salk. 520. pl. 21. Mich. 2 Ann. B. R. Anon.

8. If one plead a plea that is not good, and the plaintiff doth demur upon it, the defendant cannot afterwards amend his plea without the plaintiff's consent. Mich. 24 Car. B. R. For the defendant shall not take advantage of his own ill pleading to delay the plaintiff, and to put him to more trouble and charge than by the law he may do. 2 L. P. R. 309.

9. If the plaintiff's attorney will consent unto it, the defendant may waive his plea pleaded without moving the Court: By Roll Ch. J. 2 L. P. R. 312. cites Trin. 1651. B. S.

But if he will not consent, it cannot be done without

moving the Court; for the common course of proceeding is not to be altered but by leave of the Court, which upon cause shewn, the Court will sometimes give way unto, if the doing of it be not prejudicial to any party. 2 L. P. R. 312.

10. A man can never plead any thing afterwards, which he might have pleaded at first: for if a man have a release, and an action is brought against him, he cannot, after pleading the general issue, make use of this release; but he may at the *Nisi Prius* plead a release *post ultimum continuationem placiti*, which was made upon the issue joined: but where a release is made after verdict, and before judgment, the defendant cannot plead this release, but may bring his *audita querela* upon it. 2 L. P. R. 318.

11. But where there is a paper-book made up, the defendant hath four days to join in issue, viz. to pay the plaintiff for the entry

But if the paper book which is de-

livered to the defendant's attorney, is made up with an issue joined, the plaintiff's attorney may, upon the delivery thereof, give eight days notice of trial; but the defendant's attorney may, if he thinks fit, within four days, strike out *Et prædicti. defendants similiter, &c.* and put in a demurrer to the plaintiff's rejoinder or replication. 2 L. P. R. 321.—But if the defendant joins in the issue, by paying for the entry of his part, or

[ 391 ] pleads the general issue thereto, then the trial shall go on according to the notice given upon the delivery of the paper-book. 2 L. P. R. 321.—But if it be a rejoinder in demurrer in the paper-book, and not an issue there, although the defendant at the four days end waives his demurrer, and pleads the general issue; yet the plaintiff's attorney cannot give notice of trial upon delivery of the paper book, because no issue in fact was then joined: so that if the defendant will not, at the four days end, join in demurrer, but pleads the general issue, the notice of the trial must be given but from the time of his pleading of the general issue. 2 L. P. R. 321.

12. Before joinder in demurrer the defendant may waive his special plea, and plead the general issue. Per Cur. But if there be a rule to plead, so as to stand by it, and the defendant pleads a special plea, as he may, and the plaintiff demurs, the defendant shall not then waive, and plead the general issue. 2 Salk. 515. pl. 5. Mich. 8 W. 3. B. R. Anon. Defendant pleaded to the *scire facias* upon his recognizance of bail payment by the principal; to which plaintiff replied non-payment, and tendered an issue; whereupon defendant demurred and plaintiff joined in demurrer, moved for consilium, and set down the cause in the paper to be argued. Defendant afterwards moved to withdraw his plea, and plead *nul tiel record* of the recognizance, which was denied by the Court on hearing counsel on both sides. Notes in C. B. 237. Mich. 9 Geo. 2. *Handside v. Wilfon.*

13. Where a plea is pleaded, and the issue is entered, and the record made up to be tried at the assizes, the defendant cannot amend his plea in this case without the consent of the plaintiff, and an order of Court, because 'tis entered upon record. 2 L. P. R. 321. cites Mich. 8 W. 3. B. R.

14. If the plaintiff alters his declaration after the defendant hath pleaded to it, the defendant may alter his plea; for by the amendment of it, it may be so altered in matter that it may require a different answer from what was formerly pleaded. 2 L. P. R. 322. tit. Pleas &c.

15. Upon a motion for leave to withdraw a special plea, and to plead the general issue, the Court declared it might be done the same Term without leave of the Court, on payment of costs, unless the plaintiff have replied, and then it must be with leave, and the defendant must pay costs. Rep. of Pract. in C. B. 67. Mich. 4 Geo. 2. *Robinson v. Simmonds.*

Notes in C. B. 230. S. C.—But where it was moved that defendant might have leave to withdraw

his plea of tender, and plead the general issue upon payment of costs, the Court denied the motion, because this alteration of the plea would put plaintiff to an inconvenience, the money pleaded to be tendered being brought into Court. Notes in C. B. 231. Hill. 7 Geo. 2. *Reev v. Probart.*

17. A rule to shew cause why the defendant should not have leave to withdraw his demurrer, and plead the general issue; the plaintiff insisted that it was not reasonable to give the defendant that liberty, since by the demurrer he had admitted the fact, and depended merely on the matter in law; but the Court were of opinion, that a *demurrer may be withdrawn*, if the party come in a reasonable time, on payment of costs; and they gave leave accordingly. Rep. of Pract. in C. B. 135. Mich. 10 Geo. 2. *Sherlock executor v. Temple*.

S. P. Tho' it was objected by the plaintiff, that by this means he had been delayed of a trial at last assizes; but it appearing that the parties had

been before a Judge, and that defendant had offered to withdraw his demurrer, and plead the general issue *time enough for the plaintiff to have tried his cause at last assizes*, the motion was granted. Notes in C. B. 243. S. C.

18. The defendants, in *Hillary Vacation*, pleaded several special pleas; but in the same Vacation, before replications were delivered, withdrew those pleas, and pleaded the general issue. Per. Cur. After a special plea pleaded, tho' the plaintiff has prepared his replication, yet the defendant may the same Term before the delivery or filing of the replication waive his special plea, and plead the general issue without paying costs. Rep. of Pract. in C. B. 155. Hill. 12 Geo. 2. *Horsfull v. Greenwood* and others.

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19. Motion was made to withdraw his plea of the general issue, and plead the same *de novo*, and pay money into Court, the defendant's attorney happening to die before payment of money into Court, as ordered by defendant, and his clerk having delivered the plea by mistake; rule to shew cause; cause being shewn, the Court said the rules of the Court are against the motion; but in the accident of death the rules must be dispensed with. Rule absolute. Notes in C. B. 254. Mich. 13 Geo. 2. *Uther and others v. Edmunds*.

## (I) Rules as to Pleadings.

1. THE Court will not upon a motion order the defendant to plead *peremptorily* by a day before the common rules of the Court for pleading be out. 2 L. P. R. 301. cites Mich. 22 Car. B. R.

2. If the defendant do, after the Term is ended, plead a *frivolous plea*, to the intent to delay the plaintiff, and to hinder him from going to a trial at the assizes, a Judge at his chamber will set aside such a plea, and order the defendant to plead such a plea as he will stand to, or else to accept of a demurrer from the plaintiff unto his frivolous plea. Hill. 22 Car. B. R. for it is the justice of the Court to speed the proceedings in law; and to bring suits to determination as soon as with conveniency and justice to all parties it may be done. 2 L. P. R. 301. tit. Pleas &c.

3. The plaintiff's attorney is not bound to receive a plea for  
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the defendant from any person that is not an attorney. 2 L. P. R. 303. cites Pasch. 23 Car. B. R. Quære.

4. An officer of the Court ought not to refuse a plea, although it be not put in in time; but the plaintiff must move the Court, and abide by their rule therein. Hill. 23 Car. B. R. For the Court, and not the attorneys, are to judge of the legality of the proceedings in all causes depending before them, as well as they are to determine the matters in law in them. 2 L. P. R. 306.

5. If a plea be put into the office in due time, it is well enough, although it be not delivered to the attorney for the plaintiff. Trin. 24 Car. B. R. So that he may not enter judgment for want of a plea; but it is usual for the defendant's attorney to deliver a copy of the plea to the plaintiff's attorney, or to give notice that a plea is put into the office. 2 L. P. R. 309. tit. Pleas &c.

6. Upon a motion betwixt BRISCOE and ARNOLD, 'twas held by Glyn Ch. J. When pleadings are made up and paid for, they shall be accounted as if they were entered; for the entry belongs to clerks in the office, and not to the attorneys. 2 L. P. R. 314. tit. Pleas &c.

7. How rules to plead and declare are to be entered, and when to be given, see Rules &c. in C. B. Mich. 1654. f. 15.—And such rules shall be out at four days, inclusive of the day wherein the same were given. Ibid.

8. Imparances and Incipiturs are to be entered, or otherwise there shall be a further imparance of course. And no rule shall be given to plead without such entry, unless the prothonotary give allowance. See Rules &c. in C. B. Trin. 2: Car. 2. Reg. 2.

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give new rules to plead; but the defendant must plead in convenient time. 2 Salk. 510. pl. 20. Mich. 2 Ann. B. R. Anon.

9. The question was, whether there ought to be new rules to plead upon an amendment? Pew, clerk of the papers, said, that if the plea was of another Term, there ought to be new rules; otherwise if it be a plea of the same Term, because there is a rule to warrant the judgment. Holt Ch. J. Anciently they did not plead de novo after an amendment; therefore giving rules to plead again cannot be the ancient course; because the practice of pleading de novo is but of late introduced, but with great reason: When the plaintiff amends and gives an imparance, there should be new rules; otherwise not. 2 Salk. 517, 518. Trin. 11 W. 3. B. R. Anon.

10. On a piece of stamp paper the defendants say they are not guilty, without delivering the plea at length; the plaintiff signed judgment for want of a plea. The Court said it was no defence; so the judgment was held regular. Rep. of Pract. in C. B. 126. Hill. 9 Geo. 2. Albany v. Griffin and his Wife.

11. The defendant had obtained a Judge's order for time to plead, but did not plead within the time limited by the order.

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The plaintiff signed judgment. It was objected that no rule to plead was given; but the Court said, that the Judge having given time to plead, there was *no occasion for a rule*; so the judgment was held regular. Rep. of Pract. in C. B. 141. East. 10 Geo. 2. Dawson v. Garth.

(K) Signed by a Serjeant &c. In what Cases they must be.

1. IF there be a *special plea, replication, rejoinder, or demurrer*, there must be a counsellor's hand to it; because it is supposed to be advised by counsel, who is to maintain it to be good, if it be disputed. 2 L. P. R. 324.

2. The Court resented the number of frivolous *sham pleas* which came before them, saying, it was against the duty of counsel, and against the statute of W. 1. c. 29. and that the old rule ought to be revived, viz. that *counsel should set their hands to the books delivered to the Judges*; which was anciently so ordered, that the Court might not be troubled with frivolous pleas. 2 Salk. 517. Mich. 10 Will. 3. B. R. Anon.

3. *Per dures* was pleaded without a serjeant's hand. Upon which occasion a question arose, What sort of pleas were to have a serjeant's hand? It was held by the Court and settled, that *comperuit ad diem, son assault demesne, plene administravit, riens per discent, ne unques executor, nul tiel record, per minas, per dures, infra atatem, & solvit ad diem*, need no serjeant's hand. Rep. of Pract. in C. B. 41. Hill. 1 Geo. 2. Upton v. Pullyn.

4. But *non assumptit infra sex annos* must have a serjeant's hand. Ibid.

(L) The Manner of giving a Plea, and of putting Pleas into the Office, and keeping them there.

1. PLEAS put into the office are of two sorts, general or special; *general pleas are entered in the general plea-book by every attorney for his client*; but these are no pleas, unless the defendant's attorney do pay the plaintiff's attorney, upon demand, 1s. and 4d. or 2s. and 4d. (as the cause is) for entering his plea and warrant of attorney. *Special pleas are delivered in to the clerks of the papers, and entered into the book* [ 394 ] of the proper person to whom they belong. 2 L. P. R. 309.

2. A *colourable plea* ought to be entered, but that which is no plea ought not to be entered. Trin. 24 Car. B. R. For a colourable plea is a plea until it be over-ruled. For the Court will not spend time to dispute things which are clear. 2 L. P. R. 309.

3. The clerks of the papers of the King's Bench ought not to suffer the original pleas brought into the office to be delivered. For by the pleadings in the office are out.

the pleadings made up for the issue to be tried; and if any question arise about altering of them, they are to be examined and rectified, and (if any alteration be) by the pleas in the office, and not by any copy of the plea. 2 L. P. R. 310. cites Mich. 1649. B. S.

S. P. per Holt Ch. J. 12 Mod. 496. Pasch. 13 W. 3. Anon. — And a special plea is no plea till paid for; but if the party accept it without insisting

4. When a general plea is pleaded, the attorney ought to set his hand to the plea, or enter it in the plea-book, and pay for the entry of it; and then the issue is joined. But if he will not set his hand to the plea, and pay for the entry of it, judgment may be entered for want of a plea; for the attorney's hand, and his paying of his part for the entering of it, and of the warrant of attorney, warrants the plea; and before his hand is set to it, it is no plea. So likewise in the case of a paper-book, the defendant must set his hand to it, and pay for the entry of it. 2 L. P. R. 324. tit. Pleas &c.

upon that, it will be well; per Holt Ch. J. 12 Mod. 493. Pasch. 13 W. 3. Anon.

[For more of Plea and Pleadings in general, see Abatement, Replecation, and other proper Titles, dispersed throughout the whole work.]

### \* Pledges.

\* For the King's and the party's benefit the plaintiff ought to find pledges, that if he be nonsuited, he and his pledges shall be amerced; and likewise

#### (A) What Persons ought to find Pledges.

[1. A N infant shall not find pledges in assise. 30 Ass. 25.] if the verdict finds against him in any part; and this was grounded upon great reason, that the plaintiff should not trouble the King's Court or the party without cause; and if he did he should be punished. Per Cur. Cro. J. 413. Hill. 14 Jac. B. R. Dr. Hufley v. More.

4. Not in mortdancester. Br. Pledges, pl. 29. cites F. N. B. 195. 1. — An infant shall not find pledges. Cro. C. 161, Mich. 5 Car. B. R. Goodwin v. Moore.

The writ of the King, Queen, or of an infant shall not have the clause, Si fecerit te securum &c. because they shall not in those cases be amerced. 4 Inst. 185.

2. The King shall not find pledges; for he shall not be amerced. Br. Pledges, pl. 29. cites F. N. B. 31.

3. So of the Queen, for the same reason. Ibid. cites F. N. B. 16.

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4. Certain

4. Certain persons may find pledges de prosequendo in Chancery, as *officers of the Court and servants of the King, and poor men*, of which mention shall be in the writ, Et nisi &c. predict A. fecerit te securum de clamore suo prosequendo per fidem suam quia pauper est tunc summoncas &c. Et hoc concessum erit ex mandato cancellarii. Ibid. cites the Register 228.

An attorney or clerk in Banco, who sues a stranger there by attachment of privilege, shall find pledges de

prosequendo, as well as a stranger that sues an attorney; and for default thereof a judgment in debt was reversed, notwithstanding divers precedents were produced that an attorney need not, because he is supposed always present in Court, and that the words Si querens fecerit te securum &c. are wanting in the attachment of privilege. But divers precedents were that pledges had been found. D. 288. pl. 33. Pasch. 12 Eliz. Floteman v. Bygot. — Cro. C. 91. Mich. 3 Car. C. B. S. P. Wolfe v. Hole. — Hurt. 9a. S. C. — Het. 59. S. C.

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## (B) In what Actions [or Cases] they ought to be found.

[1.] IN a writ of *estrepement* to put the party to answer to an estrepement done by him between judgment and execution, he ought to find pledges. 22 E. 3. 2. b.]

[2. Mirror of Justices, fol. 5. cap. 1. 3. It was ordained that no action was receivable in judgment if he had not proof present of witnesses or of other thing, nor that any should be compelled to answer to a writ, nor to come to the action in the Court of the King before Judge, Commissary, before the avower found surety of the damages, and to restore the \* expences if he failed in his plaint, except recognizances of † four pieces, assises, certifications of assises, attainments, redisseisins, and other cases, which are ‡ only as offices of the King. To which ordinance King H. 1. made this mitigation in favour of poor plaintiffs, that such as had not sufficient surety present should § promise and swear to make satisfaction to their power according to a reasonable taxation. Vide ibidem fol. 21. cap. 2.]

Fol. 259.

\* Orig. (despences).

† Orig.

(Quatre peaches).

‡ Orig. anisi que del office.

§ Orig. (seront loy & serement.)

[3. In a writ of *recordare facias loquelam* pledges ought to be found, tho' the plaint in the inferiour Court be only returned, and pledges found there before. Tr. 15 Car. B. R. between *Grosse and Boscawen*. Per Curiam resolved.]

4. In *replevin* they were at issue upon the place, and the plaintiff pray'd that the defendant should gage deliverance; because adhuc detinet averia; and he was compelled to gage deliverance, and to find pledges to make the deliverance; quod nota. Br. Pledges, pl. 9. cites 22 E. 3. 7.

In replevin the defendant found pledges to gage deliverance, where he avowed

upon count quod adhuc detinet; and if he appears by attorney, his attorney shall do the like, or go to the Fleet. Br. Pledges, pl. 18. cites 1 H. 7. 11.

5. If the plaint be removed by *pone* or *recordare*, the first pledges shall stand; and if the plaintiff be nonsuited he shall be amerced. Br. Pledges, pl. 24. cites 3 H. 6. 3. per Rolf.

6. In debt the defendant tendered his law, and was compelled to find pledges of the law, and mainpernors beside the pledges, and

the pledges were not permitted to stand for both. Br. Pledges, pl. 27. cites 42 E. 3. 7.

And it was said that where the King shall have fine, surety shall be found whether he be in ward or not.

7. Error; if the defendant be not in ward he may appear by attorney, and if he be in ward he shall find surety, and shall make recognizance &c. Br. Surety, pl. 17. cites 5 E. 4. 6.

Br. Bill. pl. 26. cites S. C. — S. C. cited per Cur. 3 Bulst. 61 Trin. 13 Jac. in Case of Haver v. Gibbons.

8. *Bill in custodia marisballi*; the defendant imparled 'till another Term, and no pledges were found; and Hufsey Ch. J. by advice, made them enter pledges, and said that there is a diversity between bill and writ; for writ is, *Si fecerit te securum &c.* and bill is not so. Br. Pledges, pl. 19. cites 2 H. 7. 1, 17.

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9. In error on a judgment, the error assigned was, that the plaintiff in the first action brought a bill in Banco upon his privilege, and found no pledges in his first declaration, but found them only in his second declaration. Coke and Doderidge agreed, that if no pledges had been enter'd it had been error. Roll. R. 205. Trin. 13 Jac. B. R. Haver v. Gibbons.

10. In error brought in B. R. upon a judgment in C. B. in ravishment of ward it was mov'd, that neither upon the return of the original writ before the sheriff, nor after in Court, any pledges were returned; it was agreed by the whole Court that at the common law it was clearly error. And by three Justices, contra Haughton J. this is not aided by the body of the statute of 18 Eliz. Altho' it be within the words in the body of the act, yet it is clearly excepted by the proviso; for this action is founded upon a penal law, which the proviso excepts clearly out of the statute. And for this cause judgment was reversed. Cro. Jac. 413. Hill. 14 Jac. B. R. Dr Hufsey v. More.

The sheriff is responsible if he do not take sufficient security before he delivers cattle; it is instead of pledges, and a better way. Per Dolbein J. Comb. 228, Mich. 5 W. & M. B. R. Lane v. Foulk.

11. In replevin, taking money instead of pledges to answer the party, is not good; tho' per Berkley J. a Justice of Peace may take money to lie in deposito for the security of the peace, and the money shall be forfeited to the King if he doth not keep the peace; yet here it is not so, because the party is interested to have the benefit of the pledges by a *scire facias*, if he recover; but he has no remedy to have the money from the officer, being in his purse, if he should have judgment to recover, Cro. Car. 446. Hill. 11 Car. B. R. Mayser v. Grey, Mayor of Beverley.

Bailiffs of a borough took a replevin bond, the condition of which was, that if the above-burdened J. B. do and shall prosecute and follow with effect his suit commenced in the Court of Record of the borough of New-Windsor against T. P. for the unjust taking and detaining the goods and chattels of the said J. B. viz. at New-Windsor, within the jurisdiction of this Court, and do and shall make return of the said goods and chattels, if a return thereof shall be adjudged by law against him, then this present obligation to be void, or else &c. It was objected that this was an unlawful bond, because the bailiffs ought to have taken pledges, and not a bond; but per Cur. This is a lawful bond, and 'tis the common course, even at this day, to take such bonds; and the condition is well penn'd, all the words being general. Carth. 243. 249. Mich. 4 W. & M. B. R. Chapman & J. v. Butcher.

12. *Scire facias* lies against pledges in *replevin* after *elongavit* return'd; and pledges to be found both in a writ and a plaint by W. 2 cap. 2. See Cumb. 1. Mich. 1 Jac. 2. B. R. Dorrington v. Edwin.

13. An action was brought in C. B. by an attorney *by bill of privilege*, and no *plegii de prosequendo* found, and so returned on a *certiorari*; and for that cause judgment was reversed. 12 Mod. 198. Trin. 10 W. 3. Anon.

14. When writs were delivered to the sheriff to be by him returned into C. B. he was obliged before the return thereof to take pledges of prosecution, which, *when the fines and amercement were considerable, were real and responsible persons*, and answerable for those amercements. But they being now so inconsiderable, there are only formal pledges entered, viz. *John Doe and Richard Roe*. But there is a *difference in debt and in trespass*; for in trespass the attachment of the goods is the first process, and because the defendant is thereby hurt, therefore the writ commands the sheriff to take pledges before he executes the process. But in debt they begin with a summons, and so the defendant is not hurt in the first instance, and therefore there is no command in the writ to the sheriff to take pledges, but unless he does there is not a sufficient authority from the return to warrant further process, unless pledges are put in above, as in B. R. they always do on the bill. The reason why pledges were *not taken in Chancery*, but committed to the sheriff, was, that he living in the county was supposed to know who were sufficient security, and being to levy the amercement afterwards, they were to take ample security for them. G. Hist. of C. B. 6. 7.

## (C) *Who may receive Pledges.*

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[1. WHEN the sheriff writes to the bailiff of a *franchise* to serve a writ, *the bailiff may take pledges.* 22 Aff. 3.]

## (D) *At what Time they ought to be found.*

[1. IF a writ be to be served by the *bailiff of a franchise*, yet the *sheriff ought to take pledges before he sends to the bailiff to serve the writ.* 22 Aff. 3.]

Br. Pledges, pl. 15. cites S. C. per Sharde. But by the Recorder the plaintiff may take pledges de prosequendo well enough.

2. *Before the plaintiff has found pledges de prosequendo, the defendant cannot appear, nor is he compellable to appear.* Br. Pledges, pl. 32. cites 22 H. 6. 20.

Br. Averment contra &c. pl. 12. cites S. C.

3. In debt it was awarded per Cur. that if the plaintiff puts in a bill against a man in custody in *mareschalli*, and does not find

find pledges at the commencement, he shall not find it after; but the bill shall abate. Br. Bille, pl. 15. cites 9 E. 4. 27.

4. They ought to be found either upon the purchase of the writ in Chancery, or before the sheriff, before he executes the writ; for otherwise the sheriff is not bound to serve the writ, but may return that the plaintiff has found no pledges, yet he may serve it if he will; per Cur. Cro. J. 413. Hill. 14 Jac. B. R. Dr. Hufsey v. More.

### (E) At what Time they may be found.

In assise, the sheriff returned that the plaintiff has not found pledges, the Court may receive pledges, 22 E. 3. 3. 1 E. 3. 5. b. adjudged.]

had not found pledges de prosequendo, and the clerk re-bail'd the writ to the sheriff, and the plaintiff immediately found pledges to the sheriff. Br. Pledges, pl. 6. cites 2 H. 4. 20.

It was held by all the Justices of B. R. If pledges are omitted in bill or writ, the party may find pledges any time pending the writ: for this is in discretion of the Justices, and is only a form; quod nota. Br. Pledges, pl. 21. cites 18 E. 4. 9. — S. C. cited 3 Bulf. 61. per Curiam. Trin. 17 Jac. in Case of Haver v. Gibbons. — S. C. cited Cro. J. 414. in Case of Hufsey v. More. — S. P. Reg. Plac. 207. cites Praet. Reg. 252.

Roll. R. 205. S. C. 3 Bulf. 61. S. C. — Cro. J. 414. Hill. 14 Jac. B. R. in Curiam.]  
[2. If a man brings a bill in Bank upon his privilege, and does not find pledges in the first declaration, but finds them in the second declaration, it is good enough; for he may find them pending the writ, and those declarations are but one declaration in effect. Tr. 13 Ja. B. R. between Havert and Gibbons per Curiam.]

Jo. 439. S. C. and says that a like case was between Hicks and Heard, [398] and the same judgment given. — Mar. 46. S. C. — Error was brought in B. R. of a judgment in C. B. in replevin removed out of the Hundred Court into O. B. by recordari facias &c. Error was assigned, that it does not appear that pledges were returned upon the plaint, and whether it was error in replevin was much doubted; because the sheriff may make replevin without pledges found. And here the error is of the judgment in C. B. and it is no error in them; and peradventure the pledges were found, and not returned, and it is at the sheriff's peril, if he does not take pledges according to the statute of West. 2. cap. 2. Cro. C. 594. pl. 10. Mich. 16 Car. B. R. Tregafe v. Winnel.

[4. Pasch. 17 Jac. B. R. between Johnson and . . . . . adjudged that pledges may be put in at any time pending the writ. This was cited in the said Case of Grosse and Boscawen.]

5. In *appeal of mayhem* the defendant appear'd, and made defence, and no pledges de prosequendo were return'd, and the defendant took exception thereto, and the plaintiff found pledges in Court immediately, and therefore the defendant was compelled to answer; quod nota, by Tirwit, absente Gascoign and Hulf. Br. Pledges, pl. 8. cites 11 H. 4. 7.

S. C. cited Cro. J. 414. in Case of Hufsey v. More.

6. Bill of *debt against W. F. in custodia marescalli*; the bill was challeng'd, because the plaintiff had not found pledges, and the defendant out of ward, and the plaintiff offered pledges and could not, but the bill was abated. Br. Pledges, pl. 11. cites 9 E. 4. 27.

But upon original, tho' he has not found pledges to the sheriff, he may find pledges in

Court; but bill which has no pledge is of no value at the commencement. Ibid. S. C. cited per Cur. Cro. J. 414. Hill. 14 Jac. B. R. in Case of Hufsey v. More.

7. In an *appeal of murder*, the writ mention'd pledges to be found and named them, but in truth none were found or enter'd, as appeared by affidavit; for which reason, and also because the writ was *quia M. C. (the appellent) fecerit vos securos per plegias A. and B. &c.* which was argued to be absurd, and neither grammar nor sense, and also because they could not move in B. R. to quash this writ, it not being returnable there till the first day of the term, and if they could not move in Chancery to supersede it, a man must lie in prison a whole long Vacation as the appellee had done in the present case without bail or mainprize upon an erroneous writ without redress, it was therefore moved in Chancery to supersede the writ. And that as to what 2 Jo. 154. and other books say, that the appellor may find sureties at any time before judgment, it could not be; for that then, if the appellor find that the appellee is like to be acquitted, he will never demand judgment at all, and then the party's life may be brought twice into danger, and yet have no recompence in damages against an unjust appeal. But to this it was answered, and agreed by the Ld. Chancellor, that this writ did not issue *erronice or improvide*; that that *must be somewhat extrinsic to the writ itself*; that if there be any defect in the writ itself, they may move to quash it when it comes into B. R. if they think fit; that by the precedents in Rastal, and 2 Jo. 154. it appears that the appellor may find sureties in Court, if the sheriff return a non invenit plegias, or even at any time before judgment, that the statute of W. 2. *was not made for the finding of pledges, but for the punishment of the abettors*, and that there were many precedents where no sureties were actually found; that the sheriff may if he will attach the party without finding pledges, because they may be found afterwards, or he may refuse to attach him, and return *quia non invenit plegias*; that *quia M. C. fecerit vos securos viz.* because the party will find pledges, *is as good as si fecerit*, and that the party may find pledges to the King and then it is *quia nos*, or to the sheriff and then it is *si vos &c.* And so the motion was disallowed. Abr. Equ. Cases 416. pl. 4. cites Oct. 14, 1729. Bambridge's Case.

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(F) *How they may be found.*

[1. **W**HEN the sheriff returns that the plaintiff has not found pledges, the Court may receive pledges, tho' the plaintiff be not there in proper person. 22 E. 3. 3.]

(G) Pledges. [*The Effect of not finding Pledges.*]

[1. **I**F pledges *de prosequendo* be not found in an *assise returned*, yet the writ is served in a manner; for the plaintiff may be *essoign'd* or nonsuited. 21 E. 3. 54. b. 21 Aff. pl. 11.]

2. In *attaint* the sheriff return'd summons of jurors as in *assise*, and because *no mainprise of summons and pledges was indors'd*, for this default summons *sicut alias was awarded*, quod nota. Br. Return de Briefs, pl. 22. cites 46 E. 3. 18.

3. *Bill* is brought in *B. R. against a man in custodia marescalli*, and because he wanted pledges *de prosequendo*, therefore the bill was abated. Br. Bille, pl. 25. cites 2 H. 7. 17.

(H) *Punishment of not taking Pledges, or taking any insufficient ones.*

*So where he takes insufficient pledges, and are returned nihil.* Ibid.—If the sheriff takes no pledges in *replevin de retorno habendo* &c. he shall render to the party so many cattle &c. Br. Pledges, pl. 1. cites 2 H. 6. 15.

Insufficient pledges are as no pledges within the statute W. 2. cap. 2. 2 Inst. 340.

2. And so see there that the party may relinquish his *withernam* upon averia elongata return'd, and shall have process against the pledges, and for default of them against the sheriff. Ibid.

And for default of distress, process of *antidavit* or writ of *detinue* lies against the bailiff that made the *replevin*, without taking surety *de retorno habendo*. Br. *Replevin*, pl. 14. cites 9 H. 6. 42.—Br. *Detinue*, pl. 6. cites S. C.—And where a *seire facias* against the pledges was returned nihil, a *seire facias* was granted against the sheriff; quod nota; and the plaintiff was not put to action of *detinue*. Br. *Seire Facias*, pl. 3. cites 2 H. 6. 15.—Br. *Parliament*, pl. 3. cites S. C.—Ibid. pl. 45. cites 9 H. 6. 42.—Br. *Return de Averia*, pl. 2. cites S. C.

3. *Process* issued out of an inferior court to *distrein the beasts of B.* or that he find surety by sufficient pledges to appear at the next court. The process was directed to J. S. who was no usual officer, and he distreined the beasts of B. and the plaintiff paid him the usual fee. But J. S. without taking sufficient security re-delivered the beasts to B. and B. did not appear. This was adjudged such a deceit, upon which an action on the Case lies against J. S. tho' he was not an officer known there, but only made so hac vice for this special purpose. Lat. 159. *Wilde v. Dowse*.

4. Upon

4. Upon construction of the Stat. of West. 2. cap. 2. it was held, first, that an action of the *Cafe will lie against the sheriff for taking insufficient pledges*, and is a proper remedy to be pursued; for tho' it is not particularly \* mentioned in the statute, as being a sort of action but little in use at the time of making it, yet of late it is become frequent, being found to be an easier and more expeditious method of proceeding. Besides it appears from Cro. Car. 446. Jo. 378. that *Cafe will lie for taking no pledges at all*; and the action seems to be equally proper where insufficient pledges are taken; especially as such pledges are always *considered as none* according to 2 Inst. 340. adjudged upon a writ of error out of the Court of C. B. in an action brought against the Sheriff of Middlesex. Hill. 13 Geo. 2. B. R. Rous v. Patterfon.

5. Secondly, It was held that an action of the *Cafe will lie against the sheriff for taking insufficient pledges, setting forth a return. habend. awarded, and an elongat' return'd, without first bringing a scire facias against the pledges taken*: for tho' some \* books mention such a previous step, yet as the statute does not direct it, nor does any *Cafe* say it is necessary, it would be hard to require such a circuitous way of proceeding. Accordingly the judgment given in the Court of C. B. against the sheriff was affirm'd. Hill. 13 Geo. 2. B. R. Rous v. Patterfon.

\* 1 Inst. 340. F. N. B. 74. (F) Br. Sci. Fa. 3. 2 H. 6. 15. Rast. 567. b. Ca. Ent. 637. Skin. 244. —If the sheriff upon a replevin takes pledges de return'

habend. and upon a return awarded, returns, quod averia elongata sunt, and then a *scire facias* is brought against the pledges, and a *nihil is returned*, an action lies against the sheriff, or I may have have an action against him *upon suggestion* of this matter; per Babington J. 11 H. 6. 16. b. cited by the Ld. Ch. Justice, in the *Cafe* of Rous v. Patterfon.

## (I) Writ of Plegiis Acquietandis. Proceedings and Pleadings.

1. WHERE A. was bound in a deed of covenants, and in the said deed B. was likewise bound, and it was therein express'd, that B. was bound as a surety for A. And an action being brought against B. it was said by Knivet, that the *action ought first to be brought against A. the principal, and for non-sufficiency of him against the pledges*. Quod nota. Br. Pledges, pl. 12. cites 19 E. 3. 9.

S. P. and if the surety who is bound to pay a certain sum of money, or to do any other thing &c. be dis-

trained by the sheriff &c. they shall have a *special writ upon the statute to discharge them*. And it seems that this writ lies where a man recovers against the sureties in the county, and the sheriff distrains them to pay the debt, where the principal is sufficient; but if he sue the sureties in the Common Pleas, where the principal is sufficient to pay the debt &c. now whether the sureties may plead that, and aver that the principal debtor is sufficient to pay it, or whether they shall have a writ to the sheriff not to distrain them if the principal be sufficient; quære of these cases? And the process in the writ is summons, attachment, and distress &c. F. N. B. 137. (F.)

2. Debt upon plegiis acquietandis; the *sheriff return'd the defendant nihil*, and the plaintiff pray'd *capias*, and could not have it because this action is in nature of a covenant, and he shall recover only damages. Br. Pledges, pl. 2. cites 43 E. 3. 1.

3. Plegiis

\* A. and B. are bound conjunctim & divisim for the debt of A.—B. is sued, and requests A. to acquit him, but he does not. B. is convicted and pays the debt; the Court held, that the writ de plegiis acquietandi

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lies not in this case, nor in any case without express name of pledge or sive, jussor in writing, as was 39 E. of the pro- mise by

words in city or borough by prescription; and in this case both the obligors are principal debtors by their bonds, and not surety the one for the other; therefore &c, tho' it was found by verdict *quod quereas posuit se in pleg. pro def. against the dettee*, yet he cannot have judgment. D. 370. a. pl. 53. Fakh. 22 Eliz. Anon.

\* F. N. B. 137. (C).

The Reporter says, quere what damages? in as much as it does not appear that the plaintiff had paid the money to the creditor.

3. Plegiis acquietandis by W. against R. because he did not acquit him of 20 l. against J. because R. was indebted to J. in 20 l. and in default of payment R. requested W. to be pledge &c. and because R. did not pay J. impleaded W. in London for nonpayment, and W. requested R. to acquit him, and he would not pay, by which W. at the suit of J. and by arrest paid the 20 l. and in default of his non-acquittal, and he often demanded R. to pay him and he would not pay; the defendant demurr'd, because he \* did not shew that he was his pledge by writing; and the other said, that he was in London where a man may be pledge without writing by usage; and the other reply'd because he had not counted of the usage, and yet he was compell'd to answer, and yet it was agreed, that a man cannot become pledge in other place where there is no such usage without writing; by which he took exception, because it is not shewn that R. was indebted to J. by writing; & non allocatur, because he has counted that he had paid for R. by which as to 10 l. he said, that he had paid to J. and had thereof an acquittance, which he would have delivered to W. in case he had demanded it, absque hoc, that W. paid it in default of R. Priſt &c. and as to the other 10 l. he said, that R. was never debtor to J. nor did W. ever become pledge for R. Priſt &c, and the others e contra. Br. Pledges, pl. 3. cites 43 E. 3. 11.

4. Ld. Coke says, some have said, that this writ is \* grounded upon the words in the statute *Mag. Chart. cap. 8. viz. "that the pledges shall have the debtor's lands and rents until they are satisfied, unless he can acquit himself against the pledges;"* and that seeing no mention is made in that statute of any deed, the pledges shall have that writ without any deed. And if the pledges have any deed, covenant, or other assurance for their indemnity, then they may take their remedy at the common law; but he says, it appears by Glanvil that this was the common law; for he saith, *soluta vero eo quod debetur ab ipsis plegiis, recuperare [recurrere] inde poterint ad principalem debitorem, si postea habuerint unde eis satisfacere possit per principale placitum*, and sets down the writ de plegiis acquietandis. 2 Inst. 20.

5. In plegiis acquietandis; the plaintiff counted that he was bound with the defendant and at his request as his surety to a stranger by a bill obligatory, and that the defendant did not pay the money at the day, by which the obligee su'd the plaintiff in an inferior court, and the defendant confess'd the action, and judgment was given *quod acquietet the plaintiff against the creditor of the sum and damage assessed by the Court*. D. 257. pl. 12. Mich. 9 Eliz. Cape v. Thornes.

(K) Pleadings.

1. Pledges may plead *defeasance made to their principal*. Br. Pledges, pl. 25. cites 3 H. 6. 25. per Cockin.

2. In Case against an officer (pro hac vice) of an inferior Court for redelivery of the beasts distrained by virtue of process out of that Court without taking sufficient security, and the defendant not appearing at the next Court, it was adjudged, 1. That the plaintiff having declared generally, that the defendant (in the inferior Court) had not found sufficient pledges, was good enough, being in the negative. 2. That setting forth that he hath given to the officer (the now defendant) the usual fees, without shewing what his fees were, is good; tho' otherwise it is in an action brought for his fees. Lat: 159. Wilde v. Dowse.

3. 16 & 17 Car. 2. cap. 8. s. 1. enacts, That after a verdict judgment shall not be stay'd nor reversed in the King's Courts at Westminster, Courts of Record in the counties palatine of Lancaster, Cheshire, or Durham, or of the Great Sessions in any the 12 shires in Wales for want of pledges &c.

S. 2. This act shall not extend to any appeal of felony or murder, nor to any indictment or presentment of felony, murder, treason or other matter, nor to any process upon them, nor to any action upon any penal statute, other than concerning subsidies of tonnage and poundage.

4. 4 & 5 Anna, cap. 16. s. 1. enacts, That where demurrer shall be join'd &c. the Judges shall give judgment according as the very right of the cause and matter in law shall appear &c. and no advantage shall be taken of the default of entering pledges &c. unless the same shall be shewn specially for cause of demurrer.

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[For more of Pledges in general, see Amendment, Error, Replevin, and other proper Titles.]

(A) Policy of Insurance.

1. 43 Eliz. ENacts, That it shall be lawful for the Lord Chancellor to award under the Great Seal one standing commission, to be renewed yearly at least, for the hearing and deter-

A. and B. were bail for C. in a suit against

him in the Admiralty brought by J. S. for 100l. due to him by J. S. for freight, and C. going to Barbadoes, where he had a share in a

*determining of causes arising, and policies of assurance enter'd within the Office of Assurances in London, which commission shall be directed unto the Judge of the Admiralty, the Recorder of London, 2 Doctors of the civil law, 2 common lawyers, and 8 discreet merchants, or to any 5 of them; which commissioners, or the greater part of them which shall sit, shall have power to hear, examine and decree, all such causes concerning policies of assurance in a summary course without formalities of proceedings.*

*plantation, and likewise a quarter part of the ship he was to go in, his life was insured by A. and B. his bail; a prohibition was prayed to the Court of Policy, furnishing that they proceeded there in the trial of the assurance of C.'s life, which was insisted to be triable at common law; Roll Ch. J. thought the assurance of a man's life not within the statute, as upon the buying of an office; but where he is going to sea upon merchant's affairs, his life may be assured as well as the safe return of the ship he goes in. But afterwards upon hearing counsel it was objected, that the party might have remedy in B. R. as well as in the Court of Policy, and therefore B. R. ought to be preferred, and the contract has no relation to merchandize, and so belongs not to that Court. It was replied, that the words of the policy shewed that the contract concerned merchandize; but Roll said, the words are not material, for they may be false, and the contract may be for things not touching merchandize, notwithstanding. and the intent of the statute is for things merchantable, and if they appear not so a prohibition ought to be granted, and said they could not avoid granting a prohibition. Sty. 166. Mich. 1649. Bendis v. Oyle.—And Ibid. 172, 173. S. C. by name of Denoir v. Oyle.*

Assurances may be made on men's heads as well as ships and goods; as if a man is going from the Straights, or to any port in the Mediterranean Sea, and is in danger of being taken by the Moors or Turkish pirates, and so made a slave, whereby a ransom must be paid for his redemption, they may advance a premium accordingly upon a policy of assurance; and if he be taken, the insurers must answer the ransom secured. Gen. Treat. of Trade 81. cites Mich. 29 Car. 2. B. R.

\* The plaintiff's bill was an appeal from a decree of the Court of Policies and Assurances in London; whereby the defendant below not appearing upon the first summons, the bill was ordered to be taken pro confesso against him; and for the plaintiff it was insisted, that though by the statute 43 Eliz. cap. 12. and the statute 14 Car. 2. cap. 23. the commissioners may proceed in a summary course without formalities of pleadings, yet it was very extraordinary to take a bill pro confesso upon the first summons; and they ought at least to have had the allegations in the bill proved before they proceeded to make such order; and it was said, though the course in this Court now is [not] to take a bill pro confesso after the party has once appeared and stands out in contempt, till the plaintiff is got to the end of the line, and has run through all the process of the Court against him; yet formerly this Court did not do it even in that case, without putting the plaintiff to prove the substance of his bill; whereupon the Lord Keeper reversed the decree. And though in this case the appeal was not brought within two months after the decree, according to the said act of 43 Eliz. yet in regard the defendant could not make out that the now plaintiff had been fairly summoned, the Lord Keeper admitted the appeal; and thereupon the parties agreed to try the matter in an action on the case, the plaintiff by order being not to insist upon the statute of limitations. Vern. 223, 224. Hill. 1683. in Canc. Sir James Johnson v. Desmouere.

*Prohibition:* the defendants had subscribed a policy of insurance to the plaintiff, and a loss happening, the defendant's were sued at law, and declaration delivered, thereupon the defendants summoned the plaintiff before the Commissioners for determining of policies, the same being made in the office pretending that the said policy was had and procured by fraud, and endeavoured to have the policy delivered up by order of the Commissioners there according to 43 Eliz. cap. 12. & 14 Car. 2. cap. [23] & 19 Car. 2. cap. ... Shower moved for a prohibition on a suggestion of this matter, for these reasons; viz. That they have no jurisdiction in this case; that fraud and no interest [ 403 ] annuls the policy at common law; that it is good evidence upon the general issue, that we had our action on the policy here, and so a *juris dition* was attached; that this method would deprive us of our evidence at law, viz. the written policy; that this would erect another Court of Equity in consequence to controul suits at law; besides, that they had no authority in this matter by the acts of parliament; that that summary method therein prescribed without trial by jury was never intended further than the relief of the insured against the insurers, and being such a law, was not to be extended further than the words; that the mischief recited was trouble for the insured to sue every several insurer distinctly; that though the purpose be general, viz. to hear and determine causes arising upon policies of insurance, yet several other clauses show the intent; as that upon appeal the party grieved shall first satisfy the decree, or at least deposit the monies decreed in the Commissioners hands, which plainly means the assured to be appellants, and upon suit so brought before them by the assurers upon appeal the Chancellor is to award double costs; that any other construction would make a clashing of jurisdictions; and we had a rule for a prohibition unless clause, and to stay in the mean time, but they never moved it again, and so my client was quit of them there. Show. 396. Palch. 4 W. & M. Delbis v. Proudfoot & al.—1 Sec pl. 3.

S. 2. It shall be lawful for the commissioners as well to warn the parties as to examine upon oath any witness, and to commit any person that shall contemn their decrees; and they shall once every week at least sit upon the execution of the commission in the Office of Assurances or some other place; and no person by this act may claim any fee.

S. 3. Any person griev'd by sentence of the commissioners, may within 2 months of the decree made, exhibit his bill in Chancery for the re-examination of such decree, so as every complainant, before he exhibit such bill, do either execute the sentence, or lay down in deposit with the commissioners such money as he shall be awarded to pay; and the Ld. Chancellor, in every such suit brought by such assurers, and decreed against the assurers, shall award double costs.

S. 4. No commissioner shall intermeddle in the execution of such commission in any cause where himself shall be a party; nor any commissioner (other than the Judge of the Admiralty, and the Recorder of London) shall proceed in the execution of any such commission, before he have taken his oath before the Ld. Mayor and Court of Aldermen, to proceed uprightly and indifferently between party and party.

2. If the Court of Policy have jurisdiction of the principal matter, they have also jurisdiction of all matters incident thereunto, and they may try them according to the course of their law, so that it be not contrary to the common law. Per Roll. Ch. J. Sty. 418. Trin. 1654. Oyles v. Marshall.

3. An action on the Case was brought for a thing pending in the Court of Policy of Assurance; the suit there was dismissed. The question was, if the party might have action at common law for the same thing which he had su'd for in that Court? But the whole Court held, that the action lies. For this Court being erected by the statute, has, like other Courts of Equity, jurisdiction in personam only, and not in rem; for it is a certain rule that a decree in a Court of Equity shall not be a bar in an action brought at common law; and adjudged that the plaintiff may have his action at common law. 2 Sid. 121. Mich. 1658. B. R. Came v. Moyer.

4. 13 & 14 Car. 2. 23. s. 2. The commissioners for determining causes upon policies of insurance entred within the office of assurance of London, or three of them whereof a Doctor of the Civil, a Barrister of Law of 5 years standing to be one, may proceed as 5 might have done; and in case of wilful delay of witnesses upon the first summons and tender of charges, and of parties upon the second summons, may punish the offenders by imprisonment or costs. Every such commissioners may proceed, having taking an oath before the Lord Mayor of London to proceed uprightly.

S. 3. Commissions shall issue out of the Admiralty returnable before the said commissioners to examine witnesses beyond sea or in any remote parts of the King's dominions; the commissioners or three of them may pass sentence and execution against the body and goods, and against the executors &c. of the party evicted, and assess costs of suit.

S. 4. Any

S. 4. *Any one commissioner may administer an oath to a witness, notice being given to the adverse party, and set up in the office, that such witness may be cross examined.*

S. 5. *The commissioners shall not proceed against body and goods for the same debt.*

Lex. Merc.  
86, 87. S. C.

5. If these words (*lost or not lost*) are inserted in the assurance, in such case, tho' it happens that *at the time the subscription is made the ship is cast away*, yet the insurers must answer: *but if the party who caused the insurance to be made actually saw the ship wreck'd, or had certain intelligence of it*, such subscription will not be obligatory, for the same shall be accounted a mere fraud. Gen. Treat. of Trade 70. cites Mich. 26 Car. 2. Stockden's Case.

A vessel being coming home in her voyage laden, the Owners and Master agreed together to sell

the freighters goods privately, and then to go some small distance out to sea, and there to *sink the ship*, and pretend she struck and found'r'd by extremity of weather. This being so contrived, the owners make a policy of insurance on the vessel; the goods were afterwards sold, and the master with his own hands made a hole in the bottom of the ship with an iron crow, and conveyed himself and mariners ashore, the ship being in a sinking condition. The master hereupon sent advice of the loss to the owners, who boldly demanded the money insured, and brought an action for the same; but before this cause came to trial, the merchant that freighted the vessel commenced his action of trover for the goods against the owners, and therein the fraud was detected, and judgment given for the plaintiff the merchant; also with this limitation, that if the owners proceeded in their action on the insurance, they must expect that their practice and fraud would totally poison it; so they went no farther. Gen. Treat. of Trade 71, 72. cites Hill. 32 Car. 2. B. R.

7. Upon evidence in an action upon a charter-party, the case was, that *J. S. for him, and such who should have goods upon such ship*, and *A. B.* brought an action upon this charter-party, and made averment *he had goods upon the ship*, and held good; but per Holt Ch. J. If the goods were assured as the goods of an *Hamburg merchant* who was an ally, and the goods were the goods of a *Frenchman* who was an enemy; this is a *fraud*, and the assurance is not good. Skin. 327. Mich. 4 W. & M. B. R. Anon.

Also another objection was made, the which was, that the passes were for goods, which belonged to the subjects of the King of Poland, and so restrained only to them; but the goods on board were not of the

8. At Guildhall, in an action upon the case upon a policy, the which warranted that *the ship shall have four passes, viz. a pass from the King of England, from the King of France, from the King of Poland, and the States of Holland*; and the goods were to be the goods of such a Polish subject on board the ship, *vocat. The City of Warsaw*; an action upon this policy being brought, it appeared upon the evidence, that the passes bore date in April or May, and that the ship to which they applied these passes then was regnant. & *vocat. by another name*; and that she was *not named The City of Warsaw before the August following*; and therefore these were not good and effectual passes for this ship according to the guaranty of the policy, the which intended good passes, and not elusory vain passes; and they being a fraud

*fraud upon the subscribers, the policy shall not bind them.* Skin. 404. Mich. 5 W. & M. B. R. Anon.

Subjects of Poland, but of Holland, and there.

fore not within the intent of the policy. Skin. 404, 405. Anon.—It was also insisted, that the policy being for goods of such a one without account, they ought to prove that they had any goods on board, or had shipped any goods by order of a third person, though, being without account, they need not prove the particulars, and that so was the practice, which was not contradicted; per Holt Ch. J. Skin. 405. Anon.

9. 4 Geo. 1. cap. 12. s. 3. *If any owner of, or captain, master, mariner, or other officer belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the ship, or direct or procure the same to be done, to the prejudice of any persons that shall under-write any policy of insurance thereon, or of any merchants that shall load goods thereon, he shall suffer death.*

10. Insurance was against the perils of the sea, winds, pirates and barratry of the master. It was found by verdict, that the ship was lost per fraudem & negligentiam magistri. The Court held, that every neglect of the master is not within this policy; and if he run away with the ship or imbezzle the goods, the merchant may have an action against him, but yet he may provide against it in another manner, viz. by insuring his ship and goods [ 405 ] to secure himself against such acts of barratry; for it is reasonable that merchants who venture a large share of their stocks should secure themselves in what manner they think proper against the barratry of the master and all other frauds; and this must be intended a fraud in the master, and not a bare neglect, so that this breach is well assign'd, it being a general rule that it may be assign'd in as general words as the covenant is; and if it had been assigned per baracterium magistris it had been good, but it is not necessary to assign it in the very words of the covenant, for it is sufficient if it is assigned in the sense; and they all agreed, that fraud is barratry tho' negligence might not; so the judgment was affirm'd. 8 Mod. 231. Pasch. 10 Geo. Knight v. Cambridge.

11. 11 Geo. 1. cap. 29. s. 5. *If any owner of, or captain, master, officer or mariner belonging to any ship, shall wilfully cast away, burn or destroy the ship, or direct or procure the same to be done, with intent to prejudice any person that shall have underwritten any policy of insurance thereon, or any merchant shall load goods therein, or any owner of such ship; the persons offending being thereof convicted shall be adjudged felons, and suffer without benefit of clergy.*

S. 6. *If any of the said offences shall be committed within the body of any county, the same shall be enquired determined and adjudged as felonies done within any county are to be; and if any of the said offences shall be committed upon the high seas, the same shall be tried and adjudged as by 28 H. 8. cap. 15.*

12. The defendant had lent money on a bottom-rhea bond, but had no interest in the ship or cargo. The money lent was 300l. and he insured 450l. on the ship; the plaintiff's bill was to have the policy delivered up, by reason the defendant was not concerned in point of interest as to the ship or cargo. The Court took it that the law

Note, that in this case notice was taken in the policy, that it was to insure money

on bottom-rhea; note also, that in this case the ship survived the time limited in the bottom-rhea bond, and was lost within the time limited in the policy; so if insurance be good, defendant might be intitled to the money on the bond, and also on the policy. 2 Vern. 270. *Goddart v. Garrett.*—Defendant lent the plaintiff 250 l. on a bottomry bond, and afterwards insured on the same ship; but the insurance was larger as to the voyage, there being liberty to go to other ports and places, than what were contained in the condition of the bottomry bond; the ship being lost, the defendant recovered the money on the policy of insurance, and also put the bottomry bond in suit; the ship, though lost, had deviated from the voyage mentioned in the bond, in going to Virgin Gardo to buy salt. The plaintiff brought his bill, pretending the defendant ought not to have a double satisfaction to recover both on the insurance, and also on the bond, he having insured only in respect of the money he had lent on bottomry, and had no other interest in the ship or cargo, and therefore the plaintiff would have had the benefit of the insurance, paying the premium; sed non allocatur; the defendant having paid the premium, was intitled to the benefit of the policy, and run the risque, whether the ship was lost or not; and the insurers might as well pretend to have aid of the bottomry bond, and to discount the money recovered thereon, as the plaintiff to have the money recovered on the policy to ease the bottomry bond. 2 Vern. 717. Mich. 1716. *Harman v. Vanhatten.*

[ 406 ] 13. A. insured a ship in which he had no interest [but with the words interest or no interest.] The ship was taken by the enemy, and in their possession for nine days, but before it was carried *infra presidia* it was retaken by an English man of war. The question was, whether this was such a taking as to enable the plaintiff to recover the sum insured? The case was argued by civilians on both sides. And the Court seem'd to be of opinion for the defendant; they thought the finding by the verdict that the plaintiff had no interest in the ship would make no difference. 1st, Because they never would be more favourable to an insurer non bona fide or wagerer than to one that insur'd bona fide. 2d, Because to make a different interpretation of this deed from what is commonly put upon policies of insurance would be to run counter to the designs of the parties who have made use of the same words that are us'd in such policies; nay who have expressly provided for this very case by those words (*interest or no interest*) which signify nothing at all, unless the same loss intitles to a recovery where the insurer has no interest, and where he has. And they held it to be very plain, that the property was not altered by the taking. It was directed to be argued the next Term by common lawyers. 10 Mod. 77. Hill. 10 Ann. B. R. *Affievedo v. Cambridge.*

14. The

14. The general and ordinary policy of assurance, containing all adventures, sheweth that the assurer is to bear the adventure of *thieves and robbers*, and if it were otherwise in particular, it must be declared. Mal. Lex Merc. 117.

Assurance made for pirates is to be understood also for thieves who

by night steal the goods from the ship. Mal. Lex Merc. 117, 118.—If goods are *stolen or embezzled on ship-board*, the master is answerable and not the insurer. Gen. Treat. of Trade 74. cites Lex Merc. 101, 102.

15. By the policy of assurance, the *assuror is to answer for all damages*, detriment or hurt which shall happen to the goods after his under-writing, *be it by mice, rats, moths, or other vermin*. But if he can prove the damage was before done in the ware-house, or other place, he is not bound to answer the same. Mal. Lex Merc. 117.

16. Covenant on a charter-party, the defendant in consideration of a sum agreed on for freight, should *make such a voyage, and bear all loss and damage which should befall the ship or her lading, except only perils of the sea*. Defendant pleads, that in making that voyage, the ship was taken by a man of war unknown, whereby he was hindered in making his voyage. Demurrer to it, the quere was, if the capture by unknown men of war, was a peril of the sea, or not, according to the meaning of merchants? And argued strongly that it was not. But upon a certificate of merchants read in Court, that it was so esteemed, the Court inclined thereto: yet the Court desired Crawley the master of the Trinity-House, and other sufficient merchants to be brought into the Court to satisfy them viva voce, and it was so done accordingly, and judgment pro def. Show. 322. Mich. 3 W. & M. in Case of Jefferies v. Legendra,—cites Sty. 132. Pickering v. Berkley.

Sty. 132. Mich. 24 Car. S. C. and there Bacon J. objected, that the defendant did not shew that he and his ship was carried per locos incognitos as he should have shewn; but Roll Ch. J. answer'd, that it might be the ship was yet kept upon the

sea.—S. C. cited 4 Mod. 60.

17. If goods be lawfully insured, and afterwards the vessel is disabled, by reason of which, with the consent of the merchant, they are *put into another ship, which* after arrival, *proves an enemy's ship*, and by reason thereof is subject to seizure; in this case the insurers shall answer, for that is such an accident as is within the intention of the policy of insurance, where the policy mentions against dangers of the sea, enemies, &c. as policies generally do. Gen. Treat. of Trade, 76.

18. In an extraordinary case, where *salt was laden on ship-board by several persons without any distinction*, not putting it in sacks &c. the ship arriving safe, the master delivered to the parties concerned according to their bills of lading, *as they came one by one*; but it fell out that *some of the salt was wash'd or lost*, by reason of the dampness of the ship, *so that the two last men could not receive their proportion*. Here the master is not bound to deliver the exact quantity, nor is obliged to re-deliver the very specific salt; but if there was a fault in not pumping, or not keeping dry the deck of the ship, it might alter the case, tho' there [this] is a *peril of the sea*, which the master could not prevent, and of necessity he must deliver to one before the other.

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It is no question, but that the assurers shall answer in this case; but it has been doubted, whether they can bring in the first men for contribution; for by some it is conceived that they ought not to contribute, but others held that the rest must of necessity be contributory to such a loss, so as to make no distinction in the unloading, any more than in the lading of the goods. Gen. Treat. of Com. 80. cites Moll. 245.

19. *If by occasion of lightning, the goods which are put into the boat or lighter perish, the ship and remaining goods in the ship shall answer for the same. But on the contrary, if the ship and remaining goods perish after the boat or lighter is once safe, no contribution shall be on the goods in the lighter; for the law is, that the goods shall only be liable to contributions when ship and goods are safely arrived at their intended port of discharge.* According to this rule is the assessor to answer for contribution *pro rata* of the sum by him assured. Mal. Lex Merc. 117.

Where any merchant insures merchandise from London to St. Lucar, until it be laid on shore at Sevil; this adventure is as well in the small ships, lighters, or boats, in which it is carried up to the city of Sevil till the unloading thereof there, as the same was in the ship whereby the said merchandize was transported from the port of London to St. Lucar; and any damage, either totally or in part, is to be answered by the assurers accordingly. Gen. Treat. of Trade 75.

20. As to an assessor's being liable to the adventure of goods shipped from one ship into another; sometimes in policies of assurances it happens, that upon some especial consideration this clause forbidding the transferring of goods is inserted; because in time of hostility or wars between princes, it might fall out to be unladen in such ships of those contending princes, whereby the adventure would be far greater. But according to the usual assurances, which are made generally without any exception, the assessor is liable thereunto; for it is understood that the master of a ship without some good and accidental cause would not put the goods from one ship into another, but would deliver them (according to the charter-party) at the appointed place; which is the cause that when assurance is made upon some particular goods laden in such a ship, under such a mark, the policy maketh mention of the goods laden to be transported and delivered to such a place *by the ship, or by any other ship or vessel*, until they be safely landed. So that in all these and the like, the condition makes the law. Mal. Lex Merc. 118.

If goods are insured in a certain ship bound to any foreign parts, and in the voyage it happens she becomes leaky, or receives other damage, and the super-cargo on board and master agree to freight another vessel for the safe delivery of the goods; and then after her relading, the second vessel miscarries, the assurers are discharged, without a special clause to make them liable; but if there be these words, the goods laden to be transported and delivered at such a place *by the said ship, or by any other ship or vessel until they be safely landed*, then the insurers must answer the misfortune happening. Gen. Treat. of Trade 75, 76. cites Leg. Rhod. Moll. 242.

21. If a ship be insured from the port of London to any place abroad, and before the ship breaks ground, she happens to take fire, and is burnt, the assurers in such case are not obliged to answer; for the adventure did not begin till the vessel was gone from the first port. If in the policy of insurance the words (*at and from the port of London*) had been inserted, there the insurers would have been answerable for such a misfortune; and if on such an insurance, the ship had broke ground, and afterwards had been driven

driven by storm back to the port of London, and there had took fire, the insurers must have answered; because the very breaking of ground was a commencement of the voyage; and the port of London extends from the North Foreland in the Isle of Thanet to London-bridge. Gen. Treat. of Com. 74, 75. cites Rot. Scacc. 15 Car. 2.

22. Action on a policy of insurance; the defendant pleaded non assumpsit, and the Jury found the policy, by which the insurers undertook *against perils of sea, pirates, enemies &c. from London to Venice* warranted to depart with convoy. Et per Cur. the words, *warranted to depart with convoy*, mean only, that he will leave the port, and sail with the convoy, *without any wilful default* in the master; therefore, if by default of the master, the ship is separated and taken, the insurers are not liable; but if there be no default, the master having done all that could be done, and the ship is separated and taken by the enemies, the insurers are liable; so if the ship be lost by *stress of weather*, for they insure against these by their own agreement. 2 Salk. 443. Hill. 2 W. & M. B. R. Jefferies v. Legendra.

Show. 220.  
Mich. 3 W.  
& M. S. C.  
—Canb.  
[ 408 ]  
216, 217.  
Hill. 3 W.  
& M. S. C.  
—4 Mod.  
58. S. C.  
And there  
60. per Cur.  
the word  
(depart) is  
only termi-  
nus a quo;  
if the ship  
had depart-

ed from London, and came back again by fraud, this had been no departure within the intention of this agreement. 3 Lev. 320. S. C. And it was admitted and agreed, that by the custom of merchants those words (*warranted to depart with convoy*) are the words of the assured, and not of the assurers, and that the assured is to find the convoy. And it was held by Holt Ch. J. and the greater part of the Court, that tho' the words are only (to depart with convoy) yet they extend to sail with convoy all the voyage. But the separation being by tempest at first, and the convoy and ship never meeting afterwards, and he using his endeavour to meet with the convoy, and to go with it the rest of the voyage, and being again driven back by tempest, and taken by pirates, tho' the convoy remain'd all this time at Torbay, this shall not be such neglect in the convoy as shall discharge the insurer, who might have stay'd at Foy (where he was driven) till the convoy came to him; and therefore gave judgment for the plaintiff.

23. Action on a policy of insurance by the defendant at London, insuring a ship from thence to the East-Indies, warranted to depart with convoy; and shews, that the ship went from London to the Downs, and from thence with convoy, and was lost. After a frivolous plea and demurrer, the case stood upon the declaration, to which it was objected, that here was a departure without convoy. Et per Cur. the clause *warranted to depart with convoy*, must be construed according to the usage among merchants, i. e. from such place where convoys are to be had, as the Downs &c. Holt Ch. J. contra. We take notice of the *lavus of merchants* that are general, not of those that are particular usages. It is no part of the law of merchants to take convoy in the Downs. 2 Salk. 443. Mich. 4 W. & M. B. R. Lethulier's Case.

S. P. obiter  
10 Mod.  
287. Arg.

24. Case upon a policy, which was to insure the William-galley in a voyage from Bremen to the port of London, warranted to depart with convoy: the case was, the galley set sail from Bremen under convoy of a Dutch man of war to the Elb, where they were joined with two other Dutch men of war, and several Dutch and English merchant ships, whence they sail'd to the Texel, where they found a Squadron of English men of war, and an admiral. After a stay of nine weeks, they set out from the Texel, and the galley was separated in a storm, and taken by a French privateer,

and taken again by a Dutch privateer, and paid 80l. salvage. And it was ruled per Holt Ch. J. that the voyage ought to be according to the usage, and that their going to the Elb, tho' in fact out of the way, was no deviation; for till after the year 1703, there was no convoy for ships directly from Bremen to London. And the plaintiff had a verdict. 2 Salk. 445. February 14, 1704. coram Holt Ch. J. at Nisi Prius. Bond v. Gonfales.

25. If an insurance be made on a ship generally, and the name of the ship is expressed according to the said policy of assurance made upon the very keel of the ship of such a burthen, this assurance does not extend to the goods laden in the same, when the ship is only named, and no goods at all. Mal. Lex Merc. 116.

26. An assurance made upon 1000 hides laden in such a ship, from such a place to such a place, is good, without naming the several sorts of hides laden therein; for, in all policies of assurances the words run generally upon the principal wares, and all other commodities or goods laden or to be laden by such a man, for the account of him or any other; and so this (general) includes all particular things, which when assurance is made upon them are named and specified. Mal. Lex Merc. 116.

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27. When assurances are made upon goods laden or to be laden, tho' it be uncertain what things may be laden; the same assurance must needs be of validity; for the words goods and merchandises, comprehend all uncertain things vendible. And if it were some particular thing, it is always expressed. Mal. Lex Merc. 116.

So when assurance is made upon commodities or goods without name, or not naming the number, weight or measure, but only, reserving the mark of all goods laden, or to be laden, as aforesaid. Mal. Lex Merc. 116.

28. An assurance made upon any particular goods must be declared by the particular mark of the goods belonging to such an owner, or any other; and if there be more of the said mark, the number thereof is added: and if the number were alike, the weight may distinguish the same; whereby the one sack being thrown over-board for the safe guard of the ship and goods, may be cast into a contribution; or being taken by pirates, the assurers are to pay for it. Mal. Lex Merc. 116.

S. P. Gen. Treat. of Trade 73. cites Molloy 243.—S. P. And this was held a reasonable custom, as being equal between the assurer and assured; for the last return their premium

29. If one assures goods but no goods are laden, it seems the assurer by such assurance is not liable to bear the adventure. See Mal. Lex Merc. 118.

30. But if part of the goods were laden, then the assurers are liable for so much as that part of the goods did cost or amount unto: albeit that in this, custom is to be preferred above law; for the civil law (if there be many assurers in a ship upon the goods laden therein) maketh all the assurers liable pro rata, as they have assured according to the said part of goods laden, if a loss do happen; or (if there be cause) to restore the premium, or salary of assurance in part. But the custom of assurances doth impose the loss upon those assurers which did first underwrite, and the later underwriters of the assurers do not bear any part of the loss, but must make

make restitution of the premium, and reserve only one half upon the 100*l.* or 10*s.* for their underwriting in the policy of assurance, as is observed. The civilians therefore have noted, that *in assurances the customs of the sea-laws, and use amongst merchants is chiefly to be regarded and observed.* Mal. Lex Merc. 118. (except 10*l.* [10*s.*] for subscribing) if there be no loss, when the value of the goods

amount not to reach them; nor in such case are the first subscribers at any disadvantage; for they keep their premium if the goods come home safe when the after-subscribers return theirs; and in truth those to whom the value will not reach, are never obliged. And tho' some may prove insolvent, yet in assurances each engages only for his own sum, and to make good the loss of goods so far as the sum he subscribed amounts to, but *not to make good the insolvency of others*; and there never was a custom better prov'd; for if to subscribe 100*l.* each, and the goods are 950*l.* the last stands at 50*l.* loss. And the whole Court held the custom reasonable; and judgment for the defendant. Show. 132. Mich. 1 W. & M. The African Company v. Bull.

If no goods come home, the insurer has all his premium return'd; and so it is for his advantage to have this custom preferred. And these kind of insurances are made upon accounts, when a merchant does not know whether his factor will send home any goods, or how much. Arg. says this was prov'd. Show. 134. Mich. 1 W. & M. in the Case of the African Company v. Bull.

31. In like manner, if a ship bound for a certain port, being at sea, be driven back to the same from whence it departed, and by tempest be cast away, the assurers are to answer the damage of the goods laden therein, for so much as they did assure, as they do in other casualties. Lex Merc. 118.

32. A ship is insured for more than she is worth, the money may be recovered on any loss happening, where the policy of assurance is well made, and it is declared therein that the owner did value his ship in such a sum: and where a merchant valued one barrel of saffron at 1000*l.* having privately put so much in gold in the same, the gold was taken, but the saffron was delivered; here the assurers were obliged to pay for the gold. The like is to be done for pearls, or other things so valued. Gen. Treat. of Trade 74.

33. A policy of assurance was drawn from Archangel to Leghorn, and assumptit being brought upon it, the defendant said, that the agreement before the subscription was, that the adventure should begin but from the Downs; but this agreement was not put into writing. His being but a mere parol agreement, may be altered or discharged by agreement by parol; but without it be put in writing, it shall be taken that the policy speaks the minds of the parties; for policies are things well known, and go as far as trade goes; and to suffer them to be defeated by agreements not appearing, is to lessen their credit, and to make them of no value, which yet are countenanced by two several acts of parliament. That the party may as well say, he is to have ten guineas premium, tho' the policy says but three, as to say he insur'd but from such a place, viz. the Downs, when the policy says it was from Archangel. Pemberton said, that policies were sacred things, and that a merchant should no more be allowed to go from what he had subscribed in them, than he that subscribes a bill of exchange payable at such a day, shall be allowed to go from it, and say it was agreed to be upon a condition &c. when it may be that the bill had been

S. C. cited 2 Salk. 445. by Holt Ch. J. That it [410] was held that the parol agreement should avoid the writing [which is not agreeable to the Case in Skin. 54 &c.]

negotiated; for though neither of them are specialties, yet they are of great credit, and very much for the support, convenience, and advantage of trade. Skin. 54, 55. Trin. 34 Car. 2. B. R. *Kaines v. Sir Robert Knightly*.

34. A. being at the West-Indies, sent a letter to B. to insure goods on the *Mary-galley* of St. Christopher's, Captain A. Hill, commander, at London. B. carried the letters to Stubbs who writ policies, and he, by mistake, made the assurance on the *Mary*, Captain Haslewood commander &c. This policy thus made, was subscribed by the defendant. The *Mary-galley* was lost, and then Stubbs applied to the insurers to consent to alter the policy, to which they agreed, and the mistake was mended. It was objected at the trial, that the *Mary* was a stouter ship than the *Mary-galley*, and that the insurers ought to have an increase of premium for the alteration; but it was held by Holt Ch. J. that the action well lay, and that the mistake might be set right, and that Stubbs was a good witness. 2 Salk. 444, 445. December 3, 1703. coram Holt Ch. J. at Nisi Prius. *Bates v. Grabham*, & al.

35. If a ship was laden at *Aleppo*, and comes to *Messina* that she may be insured, the adventure is to begin from *Messina*; but then it must be so expressed, nay it need not be expressed that she was laden at *Aleppo* (though the opinion of some merchants was so), as Pemberton Ch. J. said; but if the insurance was of goods laden at *Aleppo*, and they were indeed laden at *Messina*, it might make a difference. Skin. 54. Trin. 34 Car. 2. In Case of *Kames v. Sir Robert Knightly*, says this was allowed.

36. If the policy of assurance run until the ship shall have ended and be discharged of her voyage, arrival at the port to which she is bound is not a discharge until she is unladed; per tot. Cur. upon a demurrer. Skin. 243. Mich. 1 Jac. 2. B. R. Anon.

B. having the command of a merchant ship, and likewise a share in her as being an owner, in 1730 desired A. by letter to get 500*l.* insured on her. An insurance was made in the name of A. (the agent) by B.'s direction, the insurers (J. S. and T. S.) knew-  
ing nothing

37. In *indebitatus assumpsit* by B. for 5*l.* received to the plaintiff's use, and non assumpsit pleaded, the case was, that A. took a policy of insurance upon account for 5*l.* premium in the name of B. and A. paid the said premium to J. S. and A. had no goods then on board, and so the policy was void, and so the money to be returned by the custom of merchants. It was insisted that the action ought to have been in A.'s name; for the money was his, and if the policy had been good, it would have been to his advantage, and it could no ways be said to be received to B.'s use, it never being his money. Besides here may be a great fraud upon all insurers in this, that an insurance may be made in another's name, and if a loss happen, then the insurer shall pay, for that some cesty que trust had goods on board; [but] if the ship arrives, then the nominal trustee shall bring an *indebitatus assumpsit* for the premium, as having no goods on board. To all which Holt Ch. J. answered, that the policy being in B.'s name, the premium was paid in his name and as his money, and he must bring the action upon a loss, and so upon avoidance of the policy to recover back the premium; and as to the inconveniencies, it would be the same, whosoever

was to bring the action, and therefore the insurers ought with of B. In the caution to look to that beforehand. Show. 156. Pasch. 2 W. & M. *the voyage the ship was lost, and B. the captain*  
 Martin v. Sitwell.

*cast away.* M. the administratrix of B. gave J. S. and T. S. notice of the loss and the trust, and required payment to her only. But A. under a pretence that B. was indebted to him, procured the insurers to give him credit for the sum in an account which they afterwards made up with him, and then the balance of that account was carried into a new account, and this second account was afterwards settled between them. Upon a bill by M. to be relieved, it was decreed that the insurers pay her the money, and A. to pay the costs of suit, deducting thereout the charges he had been at in obtaining the policy. Barn. Chan. Rep. 319. Mich. 1740. Fell v. Lutwidge.

38. Where a policy of insurance is against restraint of princes, that extends not where the insured shall navigate against the laws of countries, or where there shall be a seizure for not paying of custom, or the like. Per Hutchins Com. 2 Vern. 176. pl. 158. Mich. 1690. Anon.

39. If a ship be insured under captain J. S. the part-owners may change the captain without notice to insurers. Quære tamen; for it might be the confidence and knowledge of the captain might be an encouragement to the insurers. Per Holt. 12 Mod. 325. Anon.

40. If after a policy of insurance a damage happens, and afterwards, in the same voyage a deviation, yet the assured shall recover for what happened before the deviation; for the policy is discharged from the time of the deviation only. 2 Salk. 444. Hill. 1 Ann. B. R. Green v. Young.

41. A ship insured was in her voyage seized by the government, and turned into a fire-ship; the question was, whether the insurers were liable. Holt Ch. J. thought it was within the word detention, but the cause was referred. 2 Salk. 444. Hill. 1 Ann. B. R. Anon.

42. On a policy of insurance on goods by agreement valued at 600 l. and the insured not to be obliged to prove any interest. Ld. Chancellor ordered the defendant to discover what goods he put on board; for although the defendant offered to renounce all interest to the insurers; yet referred it to a master to examine the value of the goods saved, and to deduct it out of the value or sum of 600 l. at which the goods were valued by the agreement. 2 Vern. 716. Mich. 1716. in Canc. Le Pypre v. Farr.

43. In the Case of an insurance, lost or not lost, in the year 1583, there was a rich ship, called the St. Peter, coming from the East-Indies for Lisbon, missing a long time, and insurance was made upon her at Antwerp and other places, at 30 per cent. Within three years after there arrived at Lisbon a smaller ship, very richly laden, which was made out of the other ship that was cast on shore in a certain island abroad; and thereupon divers controversies did arise between the owners of the goods and the assurers, as also the master and mariners. At last it was adjudged by the sea laws, that the master and mariners should have one third part, and the assurers should come in for so much pro rata as they had assured, all charges deducted, and the ship to be the owners of the former ship; with the like

con-

considerations as aforesaid, Gen. Treat. of Trade 72. cites Lex Merc. 106, 108. Moll. 241.

44. A London merchant caused a ship at Calais to be freighted for Lisbon, and to return back again to Calais or London; and the ship going to Lisbon was there laden with sugar, pepper, and other commodities, to come for London; whereupon the merchant caused 6000 French crowns to be insured on her at Roan; and it happened that the ship was cast away upon the coast of France in coming homewards, and all the goods were lost; and intimation of this was made to the assurers, and all the proof concerning the lading of the said ship was sent to the commissioners of assurances at Roan: but upon examining the bills of lading, which declared truly the quality and quantity of the goods, the merchant's factor at Lisbon (considering it was a dangerous time of war, and the merchant living in London) *left the place of the ship's discharge in blank*, and by letters over [ 412 ] land gave him notice of it, which was made apparent; here after the examination of the sea-laws and customs, and consulting experienced merchants, it was *sentenced that the insurers should be cleared, and make only a restitution of the money received by them for their premium*, out of which they abated 10s. for every 100l. for their subscribing to the policy of insurance, Gen. Treat. of Trade 72. 73. cites Lex Mercat. 112, The Case of Gerard Malynes merchant.

45. The assurator is to *have his premium or salary upon a conditional assurance*; for there is no *conditional assurance* made, but *with exception of some adventures* not to be borne by the assurator, which are not comprised in the policy of assurance. Mal. Lex Merc. 116. 117.

46. An assurance made is to be *understood always of the first voyage, unless there were a declaration of a second voyage* in the policy of assurance: and therefore assurers ought to be careful how they cause other men to assure for them in remote places, not to make them liable to two voyages for one assurance, nor to be subject to a second voyage when the first is performed. Mal. Lex Merc. 117.

47. If a merchant freights a ship with wool &c. which occasions a *forfeiture of a ship and lading*, being contrary to law; or if he lades contraband goods knowingly, and afterwards insures the same, if they are seized by the King's officers, the insurers are not compellable to bear the loss; tho' where any goods insured are *not contraband at the time of lading and insurance*, but become such by some posterior act or declaration, if they are then seized, the insurers are answerable. Gen. Treat. of Com. 76.

48. A merchant insured his goods to a port abroad, and there to be landed; the *factor, after arrival of the ship, sells the cargo aboard* without ever unlading the ship; and the *buyer of the goods contracts for the freight of them for some other port*, but before the ship breaks ground, she is by some accident destroyed; in this case the assured and buyer are left without remedy; for the property

perty of the merchandize being changed, and freight contracted de novo, the same doth amount to as much as if the goods had been landed. By the laws of Antwerp, the adventure is to be borne by the insurers 15 days after the ship's arrival in port. Gen. Treat. of Trade 76. 77. cites Molloy 243.

49. If a man in a foreign country insures a ship from any place there to London, and the ship is lost, the assurer, if he comes into England, shall answer by our law here; for the promise is transitory, and not fixed to the place where made: and so it was resolved, where a person abroad, in consideration of 10 l. had insured, that if the English merchant's ship did not come safe to London, he would pay 100 l. Afterwards the ship was robbed on the sea; and in an action brought for the 100 l. the merchant had judgment, tho' the subscription was out of the realm. Gen. Treat. of Trade 78. cites 37 H. 8. Mich. 31 Eliz.

50. Where goods are redeemed from a pirate, all the insurers must pay contribution, because the redemption is made for the safety of all; so it is where goods are wet, or receive damage by any other accident: and by the marine laws, if it be absolutely necessary to lighten a ship for her easy entrance into harbour, or a channel, two parts of the loss shall fall upon the goods, and the third part upon the ship, except the ship is of greater value than the lading, and the charge [or burden] of the goods be not the cause of her inability to enter, but some bad quality proceeding from the ship itself; or it is otherwise provided, that the goods shall be fully delivered at the port appointed for them. Gen. Treat. of Trade 80. 81. cites Lex Mercat. 109.

51. In order to the receiving and recovering of money insured, upon policies of insurance; when the persons insured have received advice of the loss of the ship or goods, they are to make application to the insurers, and produce their vouchers, witnesses, or evidences, concerning the said loss, declaring the manner and place, the cause, with all circumstances thereof, and all such proof as by letters and other means they can attain unto; with which if the insurers are satisfied, they will pay the money without any scruple, deducting the premium; nor can they make any objection to it, unless they have some reasonable ground to found it upon, as contrary intelligence &c. in which case the parties, who have insured the sums, must wait a convenient time, according to the distance of the place where the ship is affirmed to be lost, 'till more certain advice can be obtained by the insurers about it; or if nothing can be heard of the ship in any reasonable time, then the insurers are obliged forthwith to pay the money. But if after that, it should happen that the ship should arrive safe, the insurers in such case shall have the money returned them. Gen. Treat. of Trade 78, 79. [ 413 ]

52. And when it happens that some part only of the goods are lost, as in the case of ejections in a storm, or other such accidents; then the insurers make an average of it, and each man pay so much

much per cent. in proportion to the sum for which he subscribed. Gen. Treat. of Trade 78, 79.

53. If one merchant hath insured the greatest part of the adventure of a ship, and advice is received of a loss, but with hope of recovery of any part thereof, whereby he would have the assistance of the insurers, he has a privilege of making a renunciation of the lading to the assurers, and to come in himself in the nature of an insurer for so much as shall appear he hath borne the adventure of beyond his part of the value insured: and if the merchant do not renounce, yet there is a power given in the policy of insurance, for him to travel and endeavour a recovery of the adventure, after a misfortune hath happened, to which the assurers are to contribute, the same being a trouble for the ease of them; and they may appoint their servants or other persons to join therein. Gen. Treat. of Trade 79, 80. cites Lex Mercat. 115.

54. A general *indebitatus assumpsit* will lie by an insurer of a ship for the premium for which he insured, tho' the consideration of such insurance (viz. the hazard of loss) is but a contingency. Per Cur. Carth. 338. in Case of Jackson v. Colegrave.

2 Keb. 430.

S. C. and

there it is

said by

Twisden J.

That it is

not usual to

register the

policies

when they

bring an

action on the

case, but

only when

they sue be-

fore the

commissioners,

which is the more dilatory.

55. In action upon the Case upon a policy of assurance plaintiff declared upon a writing, but did not say *in curia prolat*. It was urg'd for the defendant, that as his case is he cannot plead *non-assumpsit*, but a special plea grounded on the same writing, of which he had no counterpart, nor is it entered in the office of assurance, and since the plaintiff declared upon it, he moved this in order to get a view of it. All the Court agreed, that if plaintiff would strike out of his declaration the words (*per scriptum*), the perpetual imparlance (which had been granted) should be discharged. And at length the plaintiff agreed to giveoyer. Sid. 386. Mich. 20 Car. 2. B. R. Suister v. Coel.

56. 11 Geo. 1. cap. 30. s. 43. enacts, That on all actions of debt against either of the corporations called the Royal-Exchange Assurance and the London Assurance, upon any policies under the common seal for the assuring of any ship or merchandizes at sea, or going to sea, it shall be lawful for the said corporations to plea generally, that they owe nothing to the plaintiff; and in all actions of covenant against either of the said corporations upon any policy under the common seal for assuring any ship or merchandizes at sea, or going to sea, it shall be lawful for each of the corporations to plead generally, that they have not broke the covenant in such policy contained; and if thereupon issue be joined, it shall be lawful for the jury to give such part only of the sum demanded, if it be an action of debt, or so much in damage, if it be an action of covenant, as it shall appear upon the evidence that the plaintiff ought in justice to have.

[ 414 ]

S. 44. When any vessel or merchandizes shall be insured, a policy duly stamp'd shall be issued or made out within three days at farthest, and

and the insurer neglecting to make out such policy shall forfeit 100 l. to be recovered and divided as other penalties may be by the laws relating to the stamp duties; and all promissory notes for assurances of ships or merchandizes at sea, or going to sea, are declared to be void.

[For more of Policy of Assurance in general, see *Plea and Demurrer* (S) pl. 7. and other proper Titles.]

## Poor.

### (A) Statutes.

1. 43 Eliz. cap. 2. *BE* it enacted by the authority of this present parliament, that the churchwardens of every parish, and †four, three, or two †substantial †householders there, as shall be thought meet, having respect to the proportion and greatness of the same parish and parishes, to be nominated yearly in Easter week, or within one month after Easter, under the hand and seal of two or more Justices of the Peace in the same county, whereof one to be of the quorum, dwelling in or near the same parish or division where the same parish doth lie, shall be called overseers of the poor of the same parish: and they, or the greater part of them, shall take order from time to time, by and with the consent of two or more such Justices of Peace, as is aforesaid, for setting to work the children of all such whose parents shall not by the said churchwardens and overseers, or the greater part of them, be thought able to keep and maintain their children; and also for setting to work all such persons, married or unmarried, having no means to maintain them, and use no ordinary and daily trade of life to get their living by: and also to raise weekly, or otherwise, (by taxation of every inhabitant, parson, vicar, and other, and of every occupier of lands, houses, tithes impropriate, appropriations of tithes, coal-mines or saleable underwoods in the said parish, in such competent sum and sums of money as they shall think fit) a convenient stock of flax, hemp, wool, thread, iron, and other ware and stuff to set the poor on work: and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them, being poor, and not able to work, and also for the putting out of such children to be apprentices, to be gathered out of the same parish, according to the ability of the

\* The Justices of Peace, by the general words of the statute, have power to name overseers in all parishes; and the Court was of opinion that it must extend as well to extra-parochial places as to all parishes in general, and that no subsequent words shall control the general words in the enacting part; and certainly all the poor-acts shall be construed to extend to such places as well as to other pa-

riber, when *same parish; and to do and execute all other things, as well for the disposing of the said stock, as otherwise concerning the premises, as to them shall seem convenient.*

they are within the same parish, and shall be subject to the controul of the Justices of Peace. Most of the forests in England are extra-parochial, and so is Christ-Church in Oxford, but they ought to maintain their own poor; therefore a peremptory mandamus was granted to the Justices of Peace to choose overseers in the town of Rufford, being an extra-parochial place. 8 Mod. 39. Pasch. 7 Geo. The King v. the Inhabitants of Rufford.

† Upon a motion to quash an indictment against B. for that he, with four others, being appointed overseers of the poor of such a parish, refused to take upon him that office &c. it was objected that the statute directs the nomination but of four, three or two with the churchwardens. And per Parker Ch. J. That is very odd [true] tho' in many places more are appointed than four; for the act says four, three or two shall be nominated of the inhabitants, at the discretion of the Justices (scil.) they may nominate four, three or two; it is not a limitation of the Justices' power, but it is in the very authoritative part thereof. *Where more than four are added, they are not punishable by the act, and they can be only added as assistants.* Per Powell, the question will be [ 415 ] whether the words of the act will be any more than directory, or a limitation of their authority. In most of the parishes about London, there are more than four, wherefore he said we need not determine this point; but the indictment was quash'd for another fault. MS. Cases. Trin. 11 Ann. B. R. Anon.

† It was moved for a mandamus to J. H. and J. T. Justices of Peace in the county of Dorset &c. to nominate two substantial householders to be overseers of the poor of the parish of Chardstock in the county of Dorset upon this statute; and there was an affidavit, that at a meeting of the parish after Easter last, one John B. and Mary F. were elected overseers, and at a meeting of the Justices they approved of Mr. B. and refused the woman, as being an unfit person to serve as overseer; and the old overseers refusing to nominate any other, the Justices approved the said B. only. Per Powell, a woman is not to be an overseer of the poor; and there can be no custom in a parish to put her in, because of her being a housekeeper; because this is an officer created by act of parliament. Per Parker Ch. J. the nomination is to be by the Justices, and it seems the overseers are to continue but one year. The parish here was obstinate in not having another instead of the woman, and the Justices should have nominated one of the old ones, since they were so stiff; but (because the Justices had done well in refusing the woman) he directed that they should apply to the Justices to have another nominated; and if they refused, then to apply to the Court for a mandamus the next Term. MS. Cases. Pasch. 10 Ann. B. R. Anon.

‡ A citizen of London that lived in the country in the summer, was chose overseer of the poor of the parish: the Court seem'd to discountenance such choice of one that was resident there only for some part of the summer, and was actually an inhabitant of another parish in London. Carth. 161. Mich. 2 W. & M. B. R. The King v. Moor.

S. 2. *Which said churchwardens and overseers so to be nominated, or such of them as shall not be let by sickness, or other just excuse to be allowed by two such Justices of Peace, or more, as is aforesaid, shall meet together at the least once every month, in the church of the said parish, upon the Sunday in the afternoon, after divine service, there to consider of some good course to be taken, and of some meet order to be set down in the premises, (2) and shall within four days after the end of their year, and after other overseers nominated, as aforesaid, make and yield up to such two Justices of Peace as is aforesaid, a true and perfect account of all sums of money by them receiv'd, or rated and assessed, and not received, and also of such stock as shall be in their hands, or in the hands of any of the poor to work, and of all other things concerning their said office, (3) and such sum or sums of money as shall be in their hands, and shall pay and deliver over to the said churchwardens and overseers newly nominated and appointed, as aforesaid, (4) upon pain that every one of them absenting themselves without lawful cause, as aforesaid, from such monthly meeting for the purpose aforesaid, or being negligent in their office, or in the execution of the orders aforesaid, being made by and with the assent of the said*

\* The Justices' authority in stating this account, cannot be delegated to any other. MS. Cases. Pasch. 9 Ann. B. R. in Case of the Queen v. Turner & al.

*said Justices of Peace, or any two of them before mentioned, to forfeit for every such default of absence or negligence ‡ 20 s.*

† If an overseer does not provide for the poor, he

is indictable; and if he relieves the poor when there is no necessity, it is a misdemeanor. MS. Cases. Pasch. 3 Ann. B. R. Tawney's Case.

‡ This penalty for not meeting in the church, shall never be inflicted on the overseers of the poor of extra-parochial places, because they have no church to meet in. Per Cur. 8 Mod. 40. Pasch. 7 Geo. in Case of the King v. the Inhabitants of Rufford.

If any of these officers be convicted of any of the penalties in this act, the other must levy it MS. Cases. Trin. 11 Ann. B. R. Anon.

S. 3. *And be it also enacted, that if the said Justices of Peace do perceive, that the inhabitants of any parish are not able to levy among themselves sufficient sums of money for the purposes aforesaid, then the said two Justices shall and may tax, rate and assess, as aforesaid, any other of other parishes, or out of any parish within the hundred where the said parish is, to pay such sum and sums of money to the churchwardens and overseers of the said poor parish for the said purposes, as the said Justices shall think fit, according to the intent of this law.*  
(2) *And if the said hundred shall not be thought to the said Justice able and fit to relieve the said several parishes not able to provide for themselves, as aforesaid; then the Justices of Peace at their general quarter sessions, or the greater number of them, shall rate and assess, as aforesaid, any other of other parishes, or out of any parish within the said county for the purposes aforesaid, as in their discretion shall seem fit.*

See (1.) If several inhabitants of A. have lands and tenements in the parish of B. and their tenants are so poor, that they are not able to pay to the relief of the poor of B. the landlord's inhabitant in the parish of A. [ 416 ]

shall be no discharge to them, but they shall pay for their lands and tenements which they have in the parish of B. 2 Bullst. 352. 29 July, 3 Car. Parishioners of St. Peter v. Parishioners of St. Helena.

Sir James Mountague Attorney General moved to quash an order of two Justices of the Peace for the county of the city of Norwich made upon this statute; his exception was, that it does not appear that the parishes taxed are within the hundred; for it is only said that they are within the county of the city of Norwich; and two Justices by the act, have not power to tax the county, but only the hundred, or the parishes within the hundred. To which it was answered, That if two Justices cannot relieve in this case, there can be no relief given; for it is well known there are no hundreds within cities, and the city and the county of the city are the same, and the power given to the Justices must arise upon a defect in the hundred, and where there is no hundred there can be no such defect, and the sessions could have made no order in this case. But, per Powel, this is not *casus omnis* out of the statute; and tho' the two Justices have no power, here being no hundred, yet the sessions have a jurisdiction, and may tax the county of the city in part or at large; to which the rest agreed, and (Holt absente) quashed the order, being made by two Justices only. 11 Mod. 269. Trin. 8 Ann. B. R. Parish of St. Benedict v. Parish of St. Peter's in Norwich.

There are two ways by this statute to make one parish contributory to the poor of another parish, viz. either the Justices may tax particular persons in aid to that parish which cannot relieve its own poor; or they may assess the whole parish in a certain sum, and leave it to the churchwardens and overseers to levy the same on particular persons. Per Holt. 2 Salk. 481. Hill. 9 W. 3. B. R. Dimchurch v. Eastchurch.—Shaw's Parish Law 219. cites S. C.

*Mandamus to the Justices to make a rate for the support of the poor of the parish of St. Mary's &c.* which was opposed, because the parish-officers ought to make the rate, and the Justices are only to sign it; to which it was answered, that this motion was grounded on this clause of the statute, and thereupon a mandamus was granted, directed to the Justices; and as this is a matter of right, they ought to make a return. 2 Shaw's Pract. Just. 47. cites Hill. 11 Geo. 1. The King v. the Officers of St. Mary's in Marlborough.—Shaw's Parish Law 219. cites S. C.

S. 4. *And that it shall be lawful, as well for the present as subsequent churchwardens and overseers, or any of them, by warrant from any such two Justices of the Peace, as is aforesaid, to levy as well the said sums of money, and all arrearages, of every one that shall refuse to contribute according as they shall be assessed, by distress and sale of the*

Vide (H)—Holt Ch. J. said that a man could not be distressed by virtue of

a general warrant made before the rate, but there ought to be a special warrant on purpose; and he said that a distress could not be taken for a quarter's rate before the quarter was ended; but the jury said the custom

was otherwise. 2 Salk. 512. Trin. 8 Ann. Tracy v. Talbot. — 6 Mod. 214. S. C. And says that Holt Ch. J. seemed not satisfied that they might distrain for a quarter's rate before the end of the quarter; but the jury said the custom and usage was to do it, and that to avoid the mischief that would ensue, if the party should remove out of the parish before the quarter. To which Holt Ch. J. answered, if he remove into another parish in the same county, they might distrain by warrant from the Justices as well as in the same parish; but if he removed out of the county, he agreed the remedy failed. So he gave way to the usage in that point.

\* If accounts be adjusted, and the overseers refuse to pay the balance, they cannot be committed immediately, but a warrant must issue to distrain them, and upon a return thereof there may be a commitment. MS. Cases. Pasch. 9 Ann. B. R. The Queen v. Turner & al.

The Justices cannot commit an overseer of the poor for bringing in an account to which they object, but they ought to hear it, and to strike out what is amiss in it, and balance the account. MS. Cases. At Devon Assises. Lent 1719, coram King Ch. J. Walrond's Case.

The defendant being an overseer, was committed by two Justices of Peace by a warrant, which required, that he had appeared before them, and being demanded to give a just and true account of all such monies as he had received and paid, he had only produced an account in gross of his receipts and payments, and refused to give a particular account, or produce his books &c. And they believing this to be no account according to this statute, and the defendant refusing to give any other account, therefore they commit him to be detained until he shall make a true account. And upon a habeas corpus he was here discharged. Per tot. Cur. Because the Justices had no authority to commit in this manner by this statute, for that an account was confessed to have been rendered &c. Show. 395. Pasch. 4 W. & M. B. R. The King v. Carrock.

\* See Apprentices.—An order of Justices of Peace, willing church-wardens to pay a fee.

under §1. due to him for drawing of indentures for setting out poor children to trades was quashed, as being a thing out of their power; but the way had been to order a parish-rate for keeping so much a week till a convenient sum were raised; and in that case as soon as money was raised, an action would lie for the scrivener against the church-wardens. 12 Mod. 417. Mich. 12 W. 3. B. R. Anon.

Vide (G).—Upon an appeal from a Poor Rate, the Justices refused to hear the appeal, because it was not made at the next quarter-sessions. But per Cur. The party grieved may appeal at any sessions. The Justices may

the offender's goods, as the sums of money or stock which shall be behind upon any account to be made, as aforesaid, rendering to the parties the overplus: (2) And in defect of such distress, it shall be lawful for any two Justices of the Peace to commit him or them to the common gaol of the county, there to remain without bail or mainprize, until payment of the said sum, arrearages and stock. (3) And the said Justices of Peace, or any one of them, to send to the house of correction, or common gaol, such as shall not employ themselves to work, being appointed thereunto as aforesaid. (4) And also any such two Justices of Peace to commit to the said prison every one of the said church-wardens and overseers which shall refuse to account, there to remain without bail or mainprize, until he have made a true account, and satisfied and paid so much as upon the said account shall be remaining in his hands.

S. 5. Enacts that churchwardens and overseers may bind poor children apprentices, and that they may by leave of the lord of the manor build houses on the waste for the poor to inhabit, but not to be afterwards used for the habitation of any other on the pains contained in the 31 Eliz.

S. 6. Provided always, that if any person or persons shall find themselves grieved with any cess or tax, or other act done by the said churchwardens or other persons, or by the said Justices of Peace; that then it shall be lawful for the Justices of Peace, at their general Quarter Sessions, or the greater number of them, to take such order therein, as to them shall be thought convenient; and the same to conclude and bind all the said parties.

The party grieved may appeal at any sessions. The Justices may

may not have power to alter the rate at their discretion, but they ought not to refuse to hear the appeal. MS. Cases. Mich. 8 Ann. B. R. The Queen v. the Inhabitants of St. Giles.

T. P. and S. being overseers of the poor, got their account allowed by their Justices. The parish appealed against it, and the Sessions set aside this account, and then directed a re-examination of the matter to the same two Justices, this order being removed. It was objected that here was a matter delegated by the Court, who were finally to determine the matter in question. Per Parker C. J. The overseers have four days time to pass their accounts, and they may go before any two Justices for the doing it. Till the time is past there is no compulsion used, but if this time is slip, the parish may go before any two Justices, and when these have entered upon the examination, no other Justices are afterwards to intermeddle; and when this matter comes to the sessions, they are to take such order therein as to them shall seem convenient, but need not finally determine. MS. Cases. Hill. 10 Ann. B. R. Townshend, Parsons and Smith's Case (overseers of Whitechapple.)

S. 7. enacts, *That the father and grandfather, and the mother and grandmother, and the children of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of a sufficient ability, shall at their charges relieve and maintain every such poor person in that manner, and according to that rate, as by the Justices of Peace of that county where such sufficient persons dwell, or the greater number of them, at their general Quarter Sessions shall be assessed, (2) upon pain that every one of them shall forfeit 20s. for every month which they shall fail therein.*

If a man marries a grand-mother, and has an estate with her in marriage; for this estate he shall be charged to be contributory towards

the relief and maintenance of the grandchild within the meaning of this statute, but otherwise it shall be if he has not any estate or advancement by his marriage with her. Per Whitlock and Croke J. But per Croke J. he shall be charged with keeping the grandchild during the life of the grandmother his wife; and if she dies, he shall \*not be charged after her death. 2 Bult. 346. Hill. 7 Car. B. R. in Case of the City of Westminster v. Gerrard—S. P. Just. Cafe Law 236.—S. P. Nelf. Just. 542.—But if the grandmother has no means, and she marries with one that has means, he shall not be charged with keeping the child. 2 Bult. 346. S. C.—So if the husband becomes of ability after marriage, the grandmother having no means at the time of the marriage, he shall not be bound to keep and provide for the child. Per Croke J. clearly. Ibid.—Dalt. Just. 226. cap. 73. cites S. C.—Ibid. 250. cap. 73. cites S. C.—Shaw's Parish Law 217. cites S. C.—\* Contra per Holt Ch. J. That if the wife dies he must maintain the grandchildren, tho' the relation be determined. Comb. 321. Pasch. 7 W. 3. B. R. in Case of Walton v. Spark.—Poor's Settlements 160. pl. 210. cites S. C.—S. P. Just. Cafe Law 236. cites Black. 240.—And Comb. 405. Hill. 9 W. 3. B. R. Holt Ch. J. said, that in GERRARD'S CASE of Westminster, who married the grandmother of a poor person, tho' she died, and so the relation was determined, yet the statute was construed by equity, that he was a grandfather within the statute. [But in the Case in 2 Bult. 346, it does not appear that the grandmother was dead, nor is there any resolution, the Justices differing in their opinions.]

A son in law was obliged by an order to maintain his wife's mother, having an estate with her at the intermarriage. Per Cur. He is not within the words of the statute, nor within the meaning of it; the statute extends to those persons only who ought by the law of nature to relieve their parents; and some persons were so hard-hearted as to refuse; therefore this law was made to enforce them to do that which by the law of nature they were obliged to be-fore. Poor's Settlements 91. pl. 123. The King v. Munday.—2 Shaw's Pract. Inst. 57. S. P.

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S. 8. Mayors, &c. of Corporations, being Justices of Peace, shall have the same authority within their limits as Justices of the Peace of the county. And every Alderman of London shall do and execute so much as is appointed and allowed by this act to be done by one or two Justices of Peace of any county within this realm.

S. 9. And be it also enacted, That if it shall happen any parish to extend itself into more counties than one, or part to lie within the liberties of any city, town or place corporate, and part without, that then as well the Justices of Peace of every county, as also the head-officers of such city, town, or place corporate, shall deal and intermeddle only in so much of the said parish as lieth within their liberties, and not any farther. (2) And every of them respectively with-

The parish of H. and a will called. S. was time out of mind within the rectory of H. But there is a church in S. which

from the time of H. 6. hath been used and reputed as a parish, and had all parochial rights, and churchwardens, and S. is distant two miles from H. Richardson Ch. J. held clearly, that this is a

parish within 43 Eliz. and that the overseers &c. might assent it to the relief of the poor; and the finding that from H. 6th's time till now it hath been used as a parish, does not exclude that it was not us'd so before. And this statute being made for relief of the poor, to prevent their wandering, the intent of it was to confine the relief to parishes then in esse, and so used. And per tot. Cur. judgment for the plaintiff. Hutt. 93. Hilton v. Pawle—Litt. Rep. 73. S. C. adjudged. —Nelf. Just. 533. cites S. C. —Dalt. Just. 219. cap. 73. cites S. C. —Shaw's Parish Law 198. cites S. C. —Ibid. 207. cites S. C. —Ibid. 208. S. C.

Cro. Car. 92. pl. 17. Mich. 3 Car. S. C. adjudged, that this is such a parish as is chargeable for the relief of *Stoke-Goldingham*, and not for the poor of *Hinkley*; and tho' by the finding it should not be intended to be a parish before H. 6th's time, yet being found that it was a church then, and that there were church-wardens there, it is a parish within the statute, altho' it be but a *reputative parish*; for being in use so long before, and at the time of the statute, the statute appoints that the churchwardens, and three or four overseers joined with them, shall &c. Now no churchwardens of H. are churchwardens of S. and so have nothing to do there; and the churchwardens of S. only are to meddle with the church there, and consequently with the poor of the parish. —S. P. As to *Tateridge* and *Hatfield*, where for 60 years then past, and at the time of making the statute, and ever since, T. was commonly reputed a parish of itself, and the inhabitants there chose constables, churchwardens, and overseers of the poor, and made and levied their own rates to the poor, and repaired their own church, without contributing to that of H. And tho' it was also found that antiently the vill of T. was parcel of the parish of H. and never sever'd by any legal act, and that the tithes of T. have been time out of mind paid to the parson of H. who always used to find a curate at T. and that there is no parson at T. yet T. shall be charg'd by itself, and for their own poor only. Cro. Car. 394. 395. Hill. 10 Car. B. R. Nichols v. Walker and Parker. —Shaw's Parish Law 208. cites S. C. —Ibid. 217. cites S. C. —Parishes in reputation only are within the statute, as other parishes are, if the usage of such parishes to *choose overseers* has been constant *without interruption*; but otherwise the overseers and collectors of the mother church are only within the statute; per Montague Ch. J. and Doderidge J. But Houghton J. contra as to reputative parishes being within the statute. 2 Roll. R. 160. Pasch. 18 Jac. B. R. Weedon v. Walker. —als. Hemel-Hemsted Parish, and Barington. —Dalt. Just. 249. cap. 73. cites S. C.

There were *two villis* in one parish, which had us'd severally to maintain their own poor, and now there being overseers made of the whole parish they were rated together. The question was, Whether having been us'd time out of mind to pay severally, they might now by the statute of 43 Eliz. cap. 2. be rated together? Per Hale Ch. J. If there be no chapel within the vill, where the church does not stand, it is not sufficient to make it a reputed parish within the statute of 43 Eliz. Freem. Rep. 401. pl. 527. Trin. 1675. Skellington v. Norton.

The parish of St. Botolph without Aldgate lies in two counties, viz. London and Middlesex, and hath one churchwarden and several overseers, and the parish-rates are several. And in regard that it was made appear that each part of the parish had distinct officers, and made distinct rates, and had used time out of mind to make distinct accounts to the justices of each county, the Court looked upon each division as a several parish, and ordered accordingly. Raym. 476. 477. Mich. [ 419 ] 34 Car. 2. B. R. The parish of St. Botolph without Aldgate's Case —Poor's Settlements 125. pl. 117. cites S. C. —Dalt. Just. 253. cap. 73. cites S. C. —Shaw's Parish Law 209.

Upon a dispute whether A. was a vill in the parish of B. or a parish of itself. To prove it a vill the evidence was, that there were but two churchwardens, two overseers of the poor, and that marriages, burials, and all other parochial rites were done at B. and that the inhabitants of A. did contribute to the repairs of the church at B. And to prove that A. was a parish of itself, the evidence was, that in the reign of E. 3. there was a publick chapel there, and divine service read in it at the time of making this statute; that they had formerly distinct constables, and repaired their own highways in 1654; and then the difference between A. and B. was settled by a Judge of Assize, that

that a rate was made in A. in 1654. But this was held not sufficient to make A. a parish in reputation at the time of the statute, without all other parochial rites, and therefore held to be a vill in the parish of B. 4 Mod. 158. Mich. 4 W. & M. B. R. Rudd v. Foster.——Shaw's Parish Law 208. cites S. C.

To make A. a reputed parish within 43 El. it must have a parochial chapel and chapel-wardens, and sacraments, at the time the statute was made; and because A. had but one chapel-warden, whose office was to collect the rates taxed upon A. and pay them to B. they were held part of the parish of B. and not a reputed parish within 43 Eliz.; and their having a distinct overseer, and maintaining their own poor, was not thought sufficient to make them a distinct parish. 2 Salk. 501. Mich. 4 W. & M. B. R. Rudd v. Morton.——This was the Case of BIGLESWADE AND STRATTON.

A chapel's having sacramentals only, makes it not independent of the parish, but it *must* have other badges of parishes &c. Per Cur. 12 Mod. 504. Anon.

S. 10. For not appointing overseers yearly, every Justice &c. of the division shall forfeit 5l.

S. 11. The penalties and forfeitures in this act shall be employed to the use of the poor of the same parish, by distress and sale, or in default thereof the offender shall be committed to prison, there to remain without bail or mainprize, 'till the said forfeitures shall be satisfied and paid.

S. 12. And be it further enacted by the authority aforesaid, That the Justices of Peace of every county or place corporate, or the more part of them, in their general sessions to be holden next after the feast of Easter next, and so yearly as often as they shall think meet, shall rate every parish to such a weekly sum of money as they shall think convenient, (2) so as no parish be rated above the sum of 6d. nor under the sum of one half-penny, weekly to be paid, and so as the total sum of such taxation of the parishes in every county, amount not above the rate of 2d. for every parish within the said county. (3) Which sums so taxed shall be yearly assessed by the agreement of the parishioners within themselves, or in default thereof, by the churchwardens and petty constables of the same parish, or the more part of them, or in default of their agreement, by the order of such Justice or Justices of Peace as shall dwell in the same parish, or (if none be there dwelling) in the parishes next adjoining.

S. 13. And if any person shall refuse or neglect to pay any such portion of money so taxed, it shall be lawful for the said churchwardens and constables, or any of them, or in their default, for any Justice of Peace of the said limit, to levy the same by distress and sale of the goods of the party so refusing or neglecting, rendering to the party the overplus. (2) And in default of such distress, it shall be lawful to any Justice of that limit to commit such person to the said prison, there to abide without bail or mainprize till he have paid the same.

Working-  
tools in a  
shop may be  
distrained  
for a poor  
rate. 2  
Show. 126.  
Trin. 32  
Car. 2. B.  
R. Edgcomb  
v. Spinks.  
Before this  
act, the

Justices of Peace nor Constables had no power concerning poor. Sid. 292. Trin. 18 Car. 2. B. R. in Case of the King v. the Inhabitants of Ratcliff.

S. 18. Provided always, That whereas the Island of Fowlness in the county of Essex, being environed with the sea, and having a chapel of ease for the inhabitants thereof, and yet the said island is no parish, but the lands in the same are situated within divers parishes far distant from the said island: (2) Be it therefore enacted by the authority aforesaid, that the said Justices of Peace shall nominate

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and appoint inhabitants within the said island, to be overseers for the poor people dwelling within the said island, and that both they the said Justices and the said overseers shall have the same power and authority to all intents, considerations and purposes, for the execution of the parts and articles of this act, and shall be subject to the same pains and forfeitures; and likewise, that the inhabitants and occupiers of lands there, shall be liable and chargeable to the same payments, charges, expences and orders, in such manner and form as if the same island were a parish. (3) In consideration whereof, neither the said inhabitants, or occupiers of land within the said island, shall not be compelled to contribute towards the relief of the poor of those parishes wherein their houses or lands, which they occupy within the said island, are situated, for or by reason of their said habitations or occupancies, other than for the relief of the poor people within the said island; neither yet shall the other inhabitants of the parishes wherein such houses or lands are situated, be compelled by reason of their residency or dwelling, to contribute to the relief of the poor inhabitants within the said island.

\* It was affirmed upon error in B. R. upon this statute, that tho' the statute expresses by name only (sale and distress of goods) yet if the plaintiff voluntarily delivers any goods for what he is assised to the poor, and after brings trespass thereof against the overseers, this is within the statute; for these words (sale and distress) are put in the act only for examples; and the statute shall be construed largely, i. e. if

S. 19. And be it further enacted, That if any action of trespass, or other suit, shall happen to be accounted and brought against any person or persons, for taking of any \* distress, making of any sale, or any other thing doing by authority of this present act, the defendant or defendants in any such action or suit, shall and may either plead Not guilty, or otherwise make avowry, cognizance, or justification, for the taking of the said distresses, making of sale, or other thing doing by virtue of this act, alledging in such avowry, cognizance, or justification, that the said distress, sale, trespass, or other thing, whereof the plaintiff or plaintiffs complained, was done by authority of this act, and according to the tenor, purport and effect of this act, without any expressing or rehearsal of any other matter or circumstance contained in this present act. (2) To which avowry, cognizance or justification, the plaintiff shall be admitted to reply, that the defendant did take the said distress, made the said sale, or did any other act or trespass supposed in his declaration of his own wrong, without any such cause alledged by the said defendant. (3) Whereupon the issue in every such action shall be joined, to be tried by verdict of twelve men, and not otherwise, as is accustomed in other personal actions. (4) And upon the trial of that issue, the whole matter to be given on both parties in evidence, according to the very truth of the same. (5) And after such issue tried for the defendant, or † nonsuit of the plaintiff after appearance, the same defendant to recover treble damages, by reason of his wrongful vexation in that behalf, with his costs also in that part sustained, and that to be assised by the same jury, or writ to enquire of the damages, as the same shall require.

tend to opus charita is; and trespass brought after such voluntary delivery of money is a vexation which the statute extends to suppress. Yelv. 176. Trin. 8 Jac. B. R. Okeley v. Salter &c.

† B. brought trespass against certain persons who pleaded Not guilty, and at the Nisi Prius (as appeared by the certificate of the Judge upon the back of the postea) the defendants justified as overseers of the poor of the town of Ailham, and shewed this special matter in evidence by this statute; and after the jury was charged, and returned again, the plaintiff was nonsuited. And now the Court was moved to grant a writ of inquiry of damages for the treble damages which he ought

ought to recover against the plaintiff by this statute; and upon oyer of the statute, which was, that the damages shall be assess'd &c. Dod. said, This is to be intended that it shall be tried by writ of inquiry of damages in such cases as it ought to be by the law, viz. upon discontinuance or demurrer; for the words (as the case requires) imply as much; and by the law, when a jury ought to have found a thing, and do not find it, this shall not be supplied by a writ of inquiry of damages; and this was so ruled in Banco, quod fuit concessum per Cur. that such defect shall not be supplied by writ of inquiry of damages, because then the party shall be ousted of his attain. But in the case at Bar, the writ of inquiry of damages was granted per Cur. inasmuch as the plaintiff was non-suited, so that the jury could not assess the damages; and damages were found accordingly. Roll. R. 272. Mich. 13 Jac. B. R. Brampton v. . . . .

S. 20. *Provided always, that this act shall endure no longer than to the end of the next sessions of parliament.*

*Continued until the end of the first sessions of*

*the next parliament. Continued indefinitely by 3 Car. 1. cap. 4. 16 Car. 1. cap. 4.*

2. 13 & 14 Car. 2. cap. 12. s. 21. *Whereas the inhabitants of the County of Lancashire, Cheshire, Derbyshire, Yorkshire, Northumberland, the Bishoprick of Durham, Cumberland and Westmorland, and many other counties in England and Wales, by reason of the largeness of the parishes within the same, have not or cannot reap the benefit of the act of parliament made in the 43 year of the reign of the late Queen Elizabeth for relief of the poor: (2) Therefore be it enacted by the authority aforesaid, that all and every poor, needy, impotent, and lame person and persons within every township or village, within the several counties aforesaid, shall from and after the passing of this act, be maintained, kept, provided for, and set on work within the several and respective township and village wherein he or they shall inhabit, or wherein be, she, or they was or were lawfully settled according to the intent and meaning of this act; and that there shall be yearly chosen and appointed, according to the rules and directions in the said act of 43 Eliz. mention'd, two or three overseers of the poor within every of the said townships and villages, who shall from time to time do, perform and execute all and every the acts, powers and authorities for the necessary relief of the poor within the said township or village, and shall lose, forfeit and suffer all such pains and penalties for non-performance thereof, as is limited, mentioned and appointed in and by the said in part recited act.*

In trespass a special verdict found this statute, and [ 421 ] that the parish of Kenilworth in the county of Warwick (not being any of the counties named in this statute) is a large parish having two townships, but it is not found that it is so large that parochial distribution cannot be made; and the question was, if the county of Warwick,

not being named in the statute, shall be taken within the general words (and divers other counties?) And Hopkins serjeant cited a case to be adjudged in C. B. two or three years ago, that the statute did not extend to other counties than those which are expressly named; and to this Hale inclined, but the Court would see the said precedent before they gave judgment; by which, adjourn'd. 2 Lev. 142. Trin. 27 Car. 2. B. R. Skillington v. Norton.—But afterwards in Mich. Term it was adjudged, that the statute did not extend to any other counties, but only those that are named therein. Ibid.—Freem. Rep. 401. pl. 527. Trin. 1675. S. C. by name of SKILLINGTON v. NORTON, where Hale Ch. J. said, By the words it seems to be intended for all counties in England, because the words are (or other counties;) but Serjeant Hopkins cited the judgment in C. B. in Case of WILSON AND BONNER, between CHIPPING-CAMPDEN AND BROAD-CAMPDEN in Gloucestershire, where the Judges held that this act extended to no counties but those named.—Ibid. 412. Mich. 1675. S. C. the Court gave judgment for the defendant, because though it was found to be a large parish, yet it was not found to be so big that by reason of the largeness thereof they could not reap the benefit of the act of 43 Eliz. according to the statute, and for that reason the Court gave judgment, and so did not positively rule that no other counties were within the act but those named: but Hale did now strongly incline that no other counties were within the act, and said the inconvenience would be very great; for by that means the poor boroughs would be charged with poor, and the vills, where men of good estates lived, but perhaps no poor, would be at no charge at all.—But 2 Salk. 486. pl. 44. in marg. there is a note, that in the

Case of the inhabitants of STOKELANE AND DOLTING, Hill. 11 Ann. B. R. it was adjudged by Parker Ch. J. and the whole Court, that by virtue of this act the Justices may exercise the powers given by 43 Eliz. and this act, in all extra-parochial places containing more houses than one, so as to come under the denomination of a vill or township. — And in the case of HINAN AND CHURCHAM parishes in Gloucestershire, Hill. 1738. Lee Ch. J. cited the said Case of STOKELANE AND DOLTING, in which he says it was held, that this statute *extended by equity to all the counties in England*, and that it was so held upon great deliberation.

\* This statute *relates only to the maintenance of poor and impotent persons, and not to bastards*, who are provided for by other statutes. 1 Salk. 123. Hill. 5 Ann. B. R. in Case of the parish of Budworth v. the township of Dumbley.

† The Court held, that this clause plainly *extends to towns and villages in extra-parochial places as well as within parishes*; for the law-makers had in view the inconvenience, that some towns and villages would not have the benefit of 43 Eliz. This statute is of (towns &c. in counties) and not (in parishes) and towns and villages in extra-parochial places are plainly within the words, tho' not directly within the view of the act; and though there be not officers appointed in extra-parochial places, yet the Justices ought to do it upon complaint. MS. Cases. Hill. 11 Ann.

Where the parish is not large and consisting of several townships, so as the 43 Eliz. may be of benefit to them, the Justices ought not to appoint particular overseers according to this statute. M. S. Cases. Trin. 11 Ann. B. R. the Queen v. the Inhabitants of Dolting.

3. 9 Geo. 1. cap. 7. s. 1. enacts, *That no Justice of Peace shall order relief to any poor person dwelling in any parish till oath made of some reasonable cause for it, and that he had apply'd to the parishioners at vestry, or some publick meeting, or to two overseers of the poor, and was refused, and till summons of two overseers of the poor to shew cause.*

S. 2. *And any person ordered to be relieved shall be entered in the parish books, to be relieved so long as the cause for such relief continues and no longer. And if any parish-officer, (except upon sudden and emergent occasions) shall charge to the parish account any monies given to any person not registered he shall forfeit 5l. to be levied by distress and sale by warrant of two Justices, to be applied to the use of the poor of the said parish by direction of such Justices.*

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## (B) Orders of Justices &c. concerning the Poor. Good or not.

2 Shaw's  
Pract. Just.  
22 cites S. C.—Just.  
Case Law  
244. cites S. C.—Shaw's  
Parish Law,  
194. cites  
S. C.

• Exception was taken to an order of the Justices made against the parish of Stretton, because the Justices order'd them to *keep a woman, being poor, the cottage wherein she liv'd being uncertain whether in this vill or another*; but the Court refus'd to quash it, tho' it were *not averr'd that she was impotent*, because in these cases the Courts use a liberty and discretion. 2 Keb. 37. Pasch. 18 Car. 2. B. R. Kilbeck's Case.

2. An order of Justices of Peace for the maintenance of a poor woman was confirm'd, tho' it *appear'd that she was able of body to work*, but the Justices of the Peace are judges of that. Vent. 69. Pasch. 22 Car. 2. B. R. Wife's Case.

Just. Case  
Law, 244.  
cites S. C.—  
2 Shaw's  
Pract. Just.  
28. cites S. C.—Nelf.  
Just. 560.

3. A poor child was left in *Christ-Church Hospital*; upon complaint of the wardens of the hospital 2 Justices made an order on the overseers of the poor of the parish to receive and maintain the child; but this order was quash'd, because it was *not said, that the parents were unknown, or likely to become chargeable to the parish*: for tho' a child of 3 months old be helpless, yet

yet the parents are bound to provide for it. As to the principal matter which was hinted, viz. that the hospital was bound to provide for poor children there exposed, the Court thought there was nothing in that. 2 Salk. 485. Trin. 11 W. 3. B. R. Christ's Hospital Cafe.

cites S. C.  
—Shaw's  
Parish Law  
199. cites  
S. C.

4. An order of Justices was made for relieving a woman and 4 poor children *until further order*, but did not *set forth that she was indigent*. It was quash'd for the last matter, and bad for the other, which should have been during her poverty. 10 Mod. 220. Hill. 12 Ann. B. R. The Queen v. Manchester Inhabitants.

5. It was mov'd to quash an order of *Sessions* which order'd that the *overseers* of Monks-Risborough should *pay to one R. D. 2s. per week for his maintenance*. It was objected, 1st, that it is not said that they had any money in their hands; 2dly, that it is not said that R. D. is a *parishioner* there. Quash'd Nisi. Poors Settlements 12. pl. 17. The Queen v. the Inhabitants of Monks-Risborough.

It was ob-  
jected, that  
the Justices  
could not  
make such  
order for  
payment of  
a certain  
sum week-  
ly; the

Court seem'd to be of the same opinion, but said they do it all over England; & *communis error facit jus*, Comb. 221. Pasch. 7 W. 3. B. R. in Cafe of Walton v. Spark. — Poors Settlements 159. pl. 210. cites S. C.

6. Two Justices made an order for the overseers of the poor to pay 2s. per week to Elizabeth Reddish. It was objected that it is not said that she is poor and impotent; otherwise the statute gives them no such power. Per Cur. The 43 Eliz. does not give them power, unless they are upon the *Poor-Rate*. Let them shew cause. Poors Settlements 21. pl. 30. The Queen v. the Inhabitants of Manchester.

Shaw's Pa-  
rish Law  
221. cites  
S. C.

7. An order to continue the weekly payment of 2s. to R. G. and all the arrears till they find him a house; quash'd; because the overseers have no power to find him a house, that must be done by the Lord of the manor, or by the Justices. Shaw's Parish Law 200.

### (C) Orders as to Children or Parents being rated.

[ 423 ]  
Sec (A) pl.  
1. f. 7.

1. IT was moved to discharge an order made against a *feme covert* to keep a grand-child of hers, because a *feme covert* was not bound by such an order. Roll Ch. J. answer'd, that the husband is bound to keep his wife's grand-child by the statute; but in regard that the husband is not charged by the order, but the wife who is *covert* is only charged, therefore let the order be quash'd. Sty. 283. Trin. 1651. Custodes v. Ginkes.

S. P. 2  
Shaw's  
Parish Law  
27. cites  
Style 285.  
[but it  
should be  
283.]—  
Dalt. Just.  
250. cap.  
73. cites S.  
C.

S. P. Shaw's Parish Law, 198. cites Style 251. — S. P. Just. Cafe Law 236. cites Black. 248.

2. An order of Sessions was made, that the defendant should pay 2s. a week towards the support of his father till the Court should order the contrary, which was held good, because it was

indefinite and no set time limited, and if an estate happen'd to fall to him they might apply to the Justices; otherwise if a time was limited. 2 Salk. 534. Pasch. 5 Ann. B. R. Jenkins's Case.

3. An order that the *grandfather* should *keep the grandchild*, the father being living, but unable to do it, and also to pay so much money for the time past while he was chargeable as well as for the time to come, was allowed good per Cur. MS. Cases. Mich. 6 Ann. B. R. The Queen v. Joyce.

4. On order of 2 Justices to compel Davison to allow so much a week for the maintenance of his wife and family. It was moved to quash the order, for that the Justices have not jurisdiction in this case, it being properly alimony and belonging to the Spiritual Court. And (Holt being absent) Powel said, that the Justices have no jurisdiction in this case, but this is not alimony. If a man runs away from his family, he may be punished as a rogue and a sturdy beggar; but whilst he continues resident, they cannot charge him in this manner; and quash'd the order. 11 Mod. 268. Hill. 8 Ann. B. R. The Queen v. Davison.

Poor Settlements 33. pl. 52. Hill. 1713. S. C. —And add, Suppose she had had three husbands, who shall contribute then? Sir Thomas Powis said, the last husband's father—A father was ordered to allow a maintenance to the son's wife, *he being beyond sea*; and a father-in-law has been adjudged within the meaning of the act of 43 Eliz. c. 2. 2 Shaw's Pract. Just. 44. cites Style 283—Shaw's Parish Law 217. cites S. C. [but the book is miscited.]—S. P. Dalt. Just. 226. cap. 73. says it was so done in the Case of one JOHN BALL, by order 2 Sept. 15 Jac. lib. Sess. pa. Mid.

5. An order of Justices was made, that the *father-in-law* should maintain his son's widow. But it not being set forth in the order, that the father was of sufficient ability, in which case only the act enables the Justices &c. it was quash'd. 10 Mod. 221. Hill. 12 Ann. B. R. The Queen v. Dun, or Halifax Parish.

There was another exception to the order, which was, that this allowance was to be paid

6. An order of Sessions for the father to pay so much a week for maintenance of his daughter was quash'd, because it was not set forth that she was unable to work, without which the Justices have no jurisdiction. 10 Mod. 307. Pasch. 1 Geo. B. R. The King and Gully.

until further order, whereas it should have been so long as the father continued able to allow, and the daughter poor and unable to work; but this exception was over-ruled. Ibid.—Upon complaint of the overseers, that B's daughter was deserted and impotent, the Justices adjudge and award the father to pay her so much per week. It was objected that there is no adjudication that she was impotent, only in the complaining part of the order; and the order was quashed. Poor Settlements 83. pl. 111. cites the King v. Litton.

An order was made at the Sessions, that a man should maintain his daughter, and allow her 3s. 8d. a week for her subsistence; the order was quashed, because it did not appear by the same that she was unable to work, or that she was sick, aged, or impotent, which the statute requires. 2 Shaw's Pract. Just. 25. cites 13 W. 3. B. R. Mendoza's Case.—S. P. Just. Case Law 236.—S. P. Dalt. Just. 257. cap. 73.—Shaw's Parish Law 196. cites S. C.

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7. Justices at the quarter sessions, upon complaint of the overseers, that Nicholas Tripping had left his wife, and that she was become poor and impotent, and become chargeable to the parish, and that Richard Tripping her father-in-law was of sufficient ability, did (upon its being proved that Richard was of ability to relieve her)

order

order him to pay 2s. 6d. per week. The order was quash'd for want of an adjudication that she was chargeable, and it was held, that an adjudication that the person is become chargeable is as necessary in an order of the Quarter Sessions, as in an order of two Justices. MS. Cafes, Trin. 4 Geo. B. R. The King v. Tripping.

8. Upon complaint made to the Quarter Sessions, that his son Valentine Ruth his wife and family were impotent and unable to maintain themselves, this Court does order the said Emery Ruth to pay them 4s. per week. It was objected, that it does not appear that he was resiant and liv'd in the county, that the charge is personal, and the Justices had no power over him unless he liv'd in the county. They were order'd to shew cause. Note, an affidavit was made that he liv'd in another county, but, I think, not read. Poor's Settlements 99. pl. 134. cites the King v. Emery Ruth.

### (D) Poor Rates. By whom made and How.

1. **A** Sseffments for the poor ought to be made according to the visible estate of the inhabitants there, both real and personal, and no inhabitant there is to be tax'd to contribute to the relief of the poor in regard of any estate he hath elsewhere in any other town or place, but only in regard of the visible estate he hath in the town where he dwells, and not for any other land which he hath in any other place or town; said by Hutton and Croke J. to have been resolv'd by all the Judges of England upon a reference made to them, and upon a conference by them had together. 2 Bull. 354. 9 Car. in Sir Anthony Earby's Case.

Dalt. Just. 219. cap. 73. cites S. C.—S. P. Dalt. Just. 243. cap. 73. —Ibid. 253. cap. 73. —S. P. Just. Cafe Law 233. cites Black. 263.—S. P. 2 Shaw's Pract. Just. 46, 47.

cites 2 Bull. 154.—and Shaw's Parish Law 219. cites S. C. [but it is miscited and should be 354.] —The tax to be in proportion to the yearly value, and not to the quantity of the land. 2 Shaw's Pract. Just. 44.—S. P. Nelf. Just. 533.—One who possesses lands lying in several parishes, shall be rated in every parish according to the annual value of the land lying in each parish. Dalt. Just. 254. cap. 73.

If a man lives not within a parish, he is to be assessed according to his lands; but if he lives within the parish, he is to be rated as dwelling there; per Parker Ch. J. MS. Cafes.

2. *Rent is no standing rule* for making a poor rate; for circumstances may differ, and there ought to be a regard *ad statum & facultates*. Comb. 478. Pasch. 10 W. 3. B. R. The King v. Justices of Peace of the Precinct of Catherine Church Norwich. *standing rate*; for if it be just at the first, it may not be so after; quod fuit concessum per Holt Ch. J. for lands may be improved. By 43 Eliz. the rate must be equal; therefore it ought to be continually altered as circumstances alter. 2 Salk. 526. Mich. 12 W. 3. B. R. in Case of the King v. the Inhabitants of Audley.—Shaw's Parish Law 219. S. P.

Parker said, that the Justices could not make a *standing rate*; for

3. The Sessions, upon setting aside a rate, may make a new one themselves, or order the church-wardens and overseers to make a new one, they having it in their discretion to make a new rate at sessions, or remand it to the church-wardens &c. to make a new

2 Salk. 524. S. C. and says, that the Justices may make a new one

themselves, a new one. 2 Salk. 483. Mich. 10 W. 3. B. R. The Parish of St. Leonard Shoreditch's Cafe. but they are not bound to do it, but may order the ancient inhabitants to do it. — Poors Settlements 238. pl. 280. cites S. C. — 2 Shaw's Pract. Just. 45. cites S. C. — Ibid. 46. cites S. C. — Nelf. Just. 534. cites S. C.

[ 425 ]. 4. The churchwardens and overseers may make a rate of themselves, per Cur. 2 Salk. 531. Hill. 2 Ann. B. R. in Tawney's Cafe. S. P. Just. Cafe Law 235. cites Black. 238.

— The overseers of the poor are to make the rate which is usually approved by the inhabitants, and to be allowed by the Justices. 2 Shaw's Pract. Just. 43. — S. P. Shaw's Parish Law 217.

— An overseer may make as many rates as he will, but this ought to be done by the consent of the parishioners at their general meetings, and the rate when made ought to be confirmed by two Justices of the Peace. MS. Cafes. Patch. 3 Ann. Tawney's Cafe.

It is not necessary that the parishioners should consent; for the churchwardens, by the consent of the Justices, may make a rate without the consent of the parish. Per Eyre J. MS. Cafes, Trin. 9 Ann. B. R. in Cafe of the Queen v. St. Michael's Cornhill.

\* The order need not set forth that the Justices allowing the poors rate were dwelling in or near the division or place where the parish does lie. MS. Cafes. Parish of Conbett v. St. Mary's Lincoln.

3 Salk. 260. 5. H. took part of a house in the parish of D. on the third day of December; he was rated as an inhabitant, and was distrained for a quarter's rate the Christmas following; but the distress was taken before Christmas on a general warrant made for the whole year; and in replevin it was rul'd upon evidence by Holt Ch. J. 1st, That if two several houses are inhabited by several families, who make and have but one common avenue or entrance for both; yet in respect of their original, both houses are rateable severally; for they were at first several houses; and if one family goes, one house is vacant: but if one tenement be divided by a partition, and inhabited by different families, viz. the owner in one, and a stranger in another, these are several tenements severally rateable while they are thus severally inhabited, but if the stranger and his family go away it becomes one tenement. 2dly, That H. could not be rated for the whole quarter, for poor rates are to be assessed \* monthly by the statute; and by this means a man cannot move in the middle of a quarter but he must be twice charg'd. 2 Salk. 532. Trin. 3 Ann. Tracy v. Talbot.

S. P. Nelf. 6. When goods are rated, it ought to be according to the value of lands, viz. Goods of the value of 100l. shall be rated 5l. per ann. as lands are, and the person must be charged only in the place where the goods are at the time of the assessment; for if he has no goods where assessed is distrained he may have an action of trespass &c. Dalt. Just. 253. cap. 73. S. P. 2 Shaw's Pract. Just. 45.

### (E) Poor Rates. *Liable what.*

1. *ALL* things which are real and bring in a yearly revenue may be rated and tax'd to the poor. Shaw's Parish Law 221.

2. On

2. On a motion to confirm a tax laid by the Justices of Peace on a *toll of the corporation* of W. for a rate to the poor, Hales Ch. J. said, that on a reference to him by both parties, he was of opinion that the toll was not exempted but chargeable, *tho' part of it were to maintain the Mayor*; and per Cur. a mandamus was granted to the Mayor and Justices to execute the order, Nisi. 3 Keb. 540. Mich. 27 Car. 2. B. R. The Corporation of Wickham v. the Mayor.

S. P. a Shaw's Pract. Just. 44. cites 3 Keb. 594. Shaw's Parish Law 217. cites S. C. [but it is mis cited, and should be 3 Keb.

540.]—Dalt. Just. 218. cites S. C.—S. C. that this toll time out of mind had never been taxed to the poor; and the question was, whether it could be now taxed by the statute of 43 Eliz. 2 and the Court held that it might. Freem. Rep. 419. Mich. 1675.] S. C. by name of the Case of the Poor of Wickham.

3. Note, It has been lately resolved by the Court, that *Shaw's Parish Law* ground rents are liable to the poors rate. Comb. 62. Mich. 3 Jac. 2. B. R. Anon.

217. cites S. C.—The overseer of

Stoke Nayland in Suffolk made a rate, in which he charged the *quit-rent of several manors* within the parish, which rate the Justices refused to sign, because the quit-rents ought not to be taxed; whereupon the overseer, upon application to B. R. obtained a rule to enforce the Justices to sign it, which was strongly opposed, because no instance could be given that ever the quit-rents were charged; but the Court ordered the rate to be signed, and a warrant to distrain, so that if any person thought himself aggrieved, he might replevy, and the matter in law be brought in question. Carth. 14 Mich. 3. Jac. 2. B. R. Hull's Case.—Eyre J. said, that a quit-rent is not taxable to the poor; for the tax ought to be laid upon the occupiers; but Holt said it was otherwise ruled in the Case of one WILLIAMS of Suffolk. Comb. 264. Trin. 6 W. & M. B. R. Anon.

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4. *Hospital lands* are chargeable to the poor as well as others; for no man, by appropriating his lands to an hospital, can discharge or exempt them from taxes to which they were subject before, and throw a greater burthen upon their neighbours; per Holt Ch. J. 2 Salk. 527. Pasch. 1 Ann. B. R. Anon.

Nelf. Just. 534. cites S. C.—Dalt. Just. 254. cap. 73. cites S. C.—Poor's Settlements 253. pl.

291. cites S. C.—Just. Case Law, 234. cites S. C.—2 Shaw's Pract. Just. 46. cites 2 Salk. 515.—Shaw's Parish Law 219. cites S. C. [but it should be 527.]

5. The question was, whether a *house converted into a conventicle, and used for no other purposes*, was ratable to the poors tax? The Court said, they never knew it, and order'd them to shew cause; and after the order was quash'd. Poors Settlements 124. pl. 169. Hill. 1727. Anon.

S. P. Shaw's Parish Law, 219. cites Hill. 1 Geo. 2. B. R. Anon.

6. A farmer is not to be tax'd to the poor for his necessary stock according to the lands he holds; but if he has a *super-abundant stock*, i. e. more than the land requires, he shall be tax'd for that. Just. Case Law 233. cites Black. 263, 264.

It may be laid either on lands or goods; but a farmer being assessed for the land he occupies,

7. Yet it is a quære still if a farmer is to pay a rate or tax for stock upon land. Ibid.

shall not be assessed for his stock on that land necessary for manure, nor the profits for which he has been already taxed; but for other stock he is taxable. 2 Shaw's Pract. Just. 44.—Shaw's Parish Law 217. cites S. C.—Dalt. Just. 253. cap. 73. says, it was resolved by three Judges against Holt Ch. J. that a farmer shall not be rated to the poor for his necessary stock, which he uses on his farm, for that would be in effect to make the land pay twice for one thing, viz. for the rent, and also for the stock.—But a farmer shall be taxed for his riches and stock in case the stock is more than is necessary for the carrying on his farming and paying his rent, for then it is like a stock

a stock in trade, but for stock necessary for his farming he shall not be taxed. So for extraordinary stock he shall not be charged, if it be not more than is necessary; for the act says, *every inhabitant &c. and of land*, so that there may be an inhabitant that is not an occupier of land, and he must be charged in respect of his personal estate and ability; and so it is usual to tax clothiers &c. Per three Justices against the Ch. J. MS. Cases, the Queen v. the Inhabitants of Barking of Needham.——And adds, N. B. Those farmers were never taxed before, nor were the tradesmen ever before till within these two or three years, and the order above was for rating the farmers for the corn and hay which was in their barn and stable. Ibid.

A clothier &c. having goods &c. in his shop. Just. Cafe Law 233. cites Black. 263, lands, and 264.

a great stock of wares, may be taxed for both. 2 Shaw's Pract. Just. 44.——S. P. Nelf. Just. 533.——Shaw's Parish Law 218. cites S. C.

Stock in trade, and the house wherein the stock is kept, may be both rated towards the relief of the poor, and this shall not be a double tax; but if the land be taxed, the stock upon it cannot be taxed also, for this will be double. MSS. Cases.

9. On a motion to quash a poor's rate made at the quarter-sessions in Marleborough, because it was assessed for trade, and the corporation would not assess the toll of their market, or their own lands, and they would not hear at their sessions. Per Cur. It will be inconvenient to quash poor rates. But you may take a mandamus to assess you according to law, as in the Cafe of the TOWN OF CAMBRIDGE. MS. Cases.

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See (A) pl.  
1. f. 3.

## (F) Poor Rates. Liable, Who.

S. P. Nelf. I. BY the words and meaning of the statute 43 Eliz. 2. the occupiers of the land are to be assessed, and not the lessor who receives the rents; the occupier of the land being by law only to pay the assessment, unless it be specially provided for as to this payment between him and his lessor; per Hutton and Croke J. who declared that it had been so resolved by all the Judges of England. 2 Bullf. 354. 9 Car. in Sir Anthony Earby's Cafe. Dalt. Just. 219. cap. 73.——Shaw's Parish Law 219. cites 2 Bullf. 154 [but it should be 354.]

S. P. 2 Shaw's Pract. Just. 44. cites 2 Keb. 251.——S. P. Shaw's Parish Law 217. cites S. C. [but there is no such point there].——S. P. Just. Cafe Law 233. cites Black. 260.——Every clergyman is to be rated for his glebe and tithes according to their yearly value so long as they are in his occupation; because the statute charges every occupier of tithes &c. and the clergy are contained under those general words unless particularly exempted. Dalt. Just. 254. cap. 73.

Shaw's Parish Law 221. cites S. C. 3. A mandamus was prayed to the Mayor of Chichester to sign a tax made on the palace &c. of the Bishop of Chichester, being within the parish of Subdeanry, and per Cur. it was granted; because against this there can be no prescription, and all the prebendaries that live in the same close, which is a fourth part of the town, pay it. 3 Keb. 572. Hill. 27 Car. 2. B. R. The Parish of Subdeanry v. the Mayor of Chichester.

4. A parson who lets his tithes to the parishioners may be taxed upon the poor rate; for the letting is *but an agreement* with the parishioners to retain the tithes, and the parson here has a *modus* for his tithes; tho' it was objected that the parishioners were occupiers, and so the parson not taxable. MS. Cases, Pasch. 7 Ann. The Queen v. Bartlett.

5. Those ought only to be contributory who were *livers there the year before*, and none else; per Powis J. Poor's Settlements 48. pl. 71. Mich. 12 Ann. in Case of the Inhabitants of Ware v. Petit Executor of Town.

6. A. seised of lands *demised* the same to B. reserving the yearly rent of 10l. A. covenanted with B. that he should quietly enjoy the land, and to *indemnify* him against all charges and taxes whatsoever to be imposed upon the said lands, *except tithes*. B. enter'd, and was possessed, and the church-wardens and overseers of the parish where the land lay, and of which A. was inhabitant, made a poor rate, and B. by reason of the said lands was charged with such a sum of the said rate which he paid, and brought covenant against A. and assigned the breach, in that A. did not indemnify him against the said poor rate &c. And after argument on both sides the Court were unanimously agreed that the *poor rate was not within the covenant*, and therefore gave judgment for A. the defendant. Gibb. 297. to 299. Trin. 5 Geo. C. B. Cafe v. Stephens.

7. The doctor agreed with several of the parishioners to take so much for his tithes, and made a lease to F. The doctor was rated for the tithes to the parish levies, who appeal'd; and the matter being found specially, the question was, who should be said to be the occupier, the doctor's lessee or the inhabitants? And per Cur. the *lessee must be said to be the occupier*, in regard there is no certain time limited for how long, but *only from year to year*; and per Eyre J. the letting of them is in nature of a sale, and the party looked upon as a vendee: no manner of advantage is given to the inhabitants; for they give the full value for their tithes; *otherwise had it been a contract for years*. Poor's Settlements 104. pl. 140. The Inhabitants of Lambeth v. Faircloth lessee of Dr. Ibbotson.

8 Mod. 61.  
Mich. 8  
Geo. 1722.  
S. C. by  
name of the  
KING v.  
FAIR-  
CLOUGH  
and others,  
and reports  
it to this ef-  
fect. So the  
rector of the  
[ 428 ]  
parish of C.  
by a verbal  
agreement

let his tithes to F. and others, paying to him 2s. 6d. per acre for one year; and F. and the other farmers of the said tithes let the same to the respective tenants of the lands, paying 3s. per acre for that year, excepting one tenant from whom they received tithes in kind, and paid to the rector 2s. 6d. per acre. Afterwards F. and the other farmers were charged by the church-wardens and overseers of C. towards a poor rate upon the statute 43 Eliz. cap. 2. as occupiers of the tithes, and upon an appeal to the Sessions, they were discharged as to all excepting only 7s. which they were ordered to pay for the tithes of that tenant which they received in kind. And all this being removed into B. R. by certiorari, the question was, who should be accounted the occupiers of those tithes, whether the farmers who paid the rent to the rector, or the tenants of the lands who paid their rent for the tithes to the farmers? After argument, the Court was of opinion, that the farmers should be accounted the occupiers of those tithes; it is true, it might be otherwise if an *under-lease* had been made thereof, but this is a particular case, and it appears by the rate that the farmers have 6d. per acre profit; and if the rate is assessed on the profits of the tithes, it ought to be assessed on them, because it does not appear to the Court, that the landholders had any profit; for they may have a hard bargain, therefore they shall rather be accounted buyers of those tithes than occupiers; for where an agreement is made for tithes they shall pass by way of bargain, otherwise they cannot pass at all, because they lie in grant, and therefore they cannot otherwise pass than a deed; for a verbal agreement for them is good only for a year. The money which the farmers receive of the landholders for those tithes shall be accounted a *modus*, and wherever there

is a modus, he who receives it shall be taken to be the occupier of the tithes. So where a man has a wood, or standing corn, and sells the same standing, the seller shall pay tithes for that year. In this case, the rector who serves the cure for 2s. 6d. per acre shall not contribute to the poor's tax, but the farmers who have such a benefit of 6d. per acre without any manner of consideration for it by raising so much on the land-holders; therefore the Sessions order was quashed, and the rate confirm'd.

See (A) pl. (G) Rates. Good or not. And *set aside* in what Cases.

1. **T**HERE are four adjacent towns within the parish of Banbury, and there is an overseer within each town, and an overseer also within the borough; they all join in one account, and there is but one rate made for all the parish, but the overseers of each particular town collect and pay the money within such town; one who is tenant of lands in one of these towns lives in the borough, and is assessed by the overseer of the borough for the lands within the town, and paid to the overseer of the borough; and the like is done in the other towns; so that the overseer of the borough had a surplussage for the poor within the borough, and the overseers of the towns wanted money for the relief of the poor within the towns, tho' the poor within the towns were less than those within the borough; and upon this the Justices ordered, that there should be a distribution made; and this order with others being removed, it was moved to be quashed by North and Levinz, but confirmed; and tho' the statute of 14 Car. 2. was cited, and this case urged to be within that statute, it was not agreed to be within that statute. Skin. 258. Mich. 2 Jac. 2. B. R. The Case of the Borough of Banbury and the adjacent Towns.

2. Altho' a poor's rate be *really made at the Sessions on an appeal*, yet if it *does not appear by the order itself*, as by recital of the former order &c. the later order shall be quashed, and the Court refused to supply this defect in the order by affidavits. Comb. 133, 134. Trin. 1 W. & M. B. R. Anon.

3. The church-wardens and overseers, and some of the inhabitants of this parish made a *poor's rate*, which was confirmed by two Justices, in which several were not taxed for their *personal estates* (which was erroneous), but the whole lay on the real estates of the parish; on which several of the inhabitants appeal'd to the Sessions, and they ordered that the said rate should be annulled, and a new one made; accordingly the church-wardens made a new rate both on the real and personal [ 429 ] estates, which rate was confirmed by two Justices. But in the new rate there was a great inequality, the *real estates* being rated in proportion ten times more than the *personal*; for which several of the inhabitants appeal'd again to the Sessions, where another order was made to discharge the said rate. And now these two orders of Sessions being removed by certiorari into B. R. it was moved to quash them; because the Sessions can only relieve particular persons grieved by the rate, and cannot

cannot set aside *the whole rate*. Sed per tot. Cur. Sure the Justices at sessions, upon an appeal by particular persons grieved, may, if they see reason, set aside the whole rate. The Justices have a large power, and in both these cases, either on the first rate where the personal estates were not charged, or upon the second where they are unequally charged, it is impossible for them to give relief without setting aside the whole rate, which therefore they may legally do, being impowered by the act to take order herein *according to their discretion*; by virtue of which, as they may set aside the whole rate, so they may make a new rate themselves, or order the overseers &c. and church-wardens to make a new one, as was done in this case; wherefore those two orders were confirmed. 12 Mod. 212. Mich. 10 W. 3. B. R. The King v. the Inhabitants of St. Leonard Shoreditch.

4. If a poor rate be made for a whole year, it cannot be confirmed in part, but must be for the whole or no part. 8 Mod. 10. Mich. 7 Geo. Bishopsgate Church-wardens v. Beecher.

5. If the rate be illegal, the *\* Justices may refuse to sign it*, but as to the sums or parties assessed they have nothing to do with it, the remedy is by appeal; and tho' the Aldermen of Dorchester refused to sign a rate because of inequality, yet the Court granted a mandamus, and after a return a peremptory mandamus, and then an attachment, in order that the parties grieved might appeal. Cited per Cur. MS. Cases. Mich. 8 Geo. B. R. in Case of the King v. Beecher.

\* And they may return it for cause upon a mandamus directed to them to sign it. MS. Cases. Hill. 4 Geo. B. R. in Case of the In-

habitants of Boston v. the Inhabitants of Horncastle in Lincolnshire.

6. A rate that is of itself good, may be quash'd, where it says it shall be a standing rate; per Earl. Poor's Settlements 23. pl. 33. in Case of Shagforth v. Northovey in Devon.

Parker said he never knew a poor's rate quash'd. If

the rate is not good, it is a mere nullity, and you are not bound to obey it. Poor's Settlements 48. pl. 41. in Case of the parish of Ringmere v. Petworth in Suffex.—Shaw's Parish Law 221. S. P.

7. To quash a poors rate the parties aggrieved appealed to the Sessions; the Sessions made an order to levy the money on account of the rate according to the land-tax; it was mov'd to quash it, because persons that do not pay to the land-tax, yet contribute to the poors rate, as persons who have a considerable sum of money. Quash'd, per Cur. Poors Settlements 73. pl. 96. The Parish of Camberwell's Case.

S. P. Shaw's Parish Law 221.

## (H) Remedies for recovering of Rates.

See (A) pl. 1. f. 4.

1. IT was said, that a warrant to distrain for a poors rate ought not to be granted before demand made; for the first ought to be only a confirmation of the assessment for the poor, and afterwards upon refusal &c. a new warrant is to be made for distress &c. and Holt said that strictly it was so, but the practice having

having been in the case of taxes to grant such a conditional warrant to distrain, *communis error facit jus*. Comb. 342. Trin. 7 W. 3. B. R. in Case of East India Company v. Skinner & al.

\* 2. If the poor rates are unreceived, and the *overseers lay out a sum of their own*, they are *remediless* if they do not raise it before they are put out of their office. Just. Case Law 235. cites Black. 237. 238.

3. The churchwardens and overseers of the poor, by warrant from any two Justices of the Peace (*Quor. 1.*) may levy the tax by distress and sale of goods where any person refuses payment of the sum he is assessed. And if there be no distress whereby the same may be levied, he shall be committed to the common goal there to remain till payment. 2 Shaw's Pract. Just. 42.

Dalt. Just.  
255. cap.  
73. cites S.  
C.—Nelf.  
Just. 534.  
cites S. C.

4. A *mandamus* was mov'd for, and a rule obtain'd for an Alderman to shew cause why he refus'd to grant his warrant to distrain for a tax for relief of the poor; who at another day shew'd that the churchwardens had made a tax for the whole year, when they should have made only a quarterly tax, and thereupon a rule was made that he should grant his warrant to distrain quarterly. 8 Mod. 10. Mich. 7 Geo. 1721. Bishopgate Churchwardens v. Alderman Beecher.

See (A) pl.  
1. f. 3.

## (I) Rates of *Parishes in Aid*.

2 Shaw's  
Pract. Just.  
46. cites S.  
C.—Shaw's  
Parish Law  
219. cites S.  
C.—

Such order  
must begin  
with two  
Justices,  
and if it be  
an original  
order of ses-  
sions it is not  
good. 5

Mod. 397. Pasch. 10 W. 3. Anon.

1. **A**N order of Sessions was returned upon stat. 43 Eliz. for rating the parishes adjacent &c. for relief of a poor parish. Exception was taken, that by the statute this ought to have been done by the *two next Justices*, whereas this order was made at sessions. And by the Solicitor General, if it be made by all the Justices &c. then it is by two, and they shall be supposed to be at the general sessions. And per Wythens, you have not pursued the statute, and do hereby prevent the appeal. Adjournatur, and it was afterwards at another day quashed for that reason. Comb. 25. Trin. 2. Jac. 2. B. R. The King v. Griesly.

2. A parish in Colchester being surcharged with poor, the Justices made an order that *two other parishes* in Colchester should pay to the relief of the poor within this parish, viz. the *one 5s. per week, and the other 8s. per week, and that the overseers should collect it*; and the order being removed by certiorari, Alibone mov'd to quash it, because not pursuant to the direction of 43 Eliz. which says (*others of other parishes*) so that it ought to be assessed by the Justices upon particular persons, and not generally, (and so it may be done, and it has been admitted it might be done this Term before; and also a case remembred in Pemberton's time, when it was so ruled). But the Court seemed to be of opinion that it was well enough, and according

to the right course; and that the Justices are only to assess the *quantum*, and then the rate is to be made by the overseers of the poor of the parish, and such was the opinion of the Court. Skin. 258. Mich. 2 Jac. 2. B. R. St. Rumbald's Parish Case.

3. It was moved to quash an order made by two Justices, that the inhabitants of L. G. should pay a yearly sum to *Whetstone*: 1st, because it was not said *quorum unus*; but that exception was disallow'd: 2dly, for that it was only said that *Whetstone* was at great charge in maintaining the poor, but not that they were unable. Note, Upon an appeal the Justices made an order at the sessions, wherein it is said they were oppressed, which implies inability. Comb. 241. Hill. 5 W. & M. B. R. The King v. the Inhabitants of Little Glen in the county of Leicester.

4. Upon an order for contribution to the relief of a poor parish it was ruled that the Justices may either charge particular persons or the whole parish, and they to levy it; but here a *sum in gross* was laid for a whole year, which (it was objected) was unreasonable; for their ability may change; nevertheless the order was confirmed. Comb. 309. Mich. 6 W. & M. B. R. The King v. Knightly Inhabitants.

Just. Case Law 234. cites S. C.—Shaw's Parish Law 216. cites S. C. [but I see no such point there]—It was resolved that the Justices might impose the charge upon any of the inhabitants of the neighbouring parish, and were not obliged to put a general tax upon the whole parish, the words of the statute being (any other of any other parish) Vent. 350. Mich. 32 Car. 2. B. R. Anon. —Dalt. Just. 253. cap. 73. cites S. C.—S. P. cited by Holt recorder, to be so ruled in the Case of a Parish in Cambridge, Mich. 32 Car. 2. B. R. after having been diverse times argued by Pemberton and Pollexfen, and it was allowed to be so by the Court. Skin. 259. Mich. 2 Jac. 2. B. R. in Case of the Borough of Banbury, and the adjacent towns.—The Justices may tax any other persons within the hundred to pay such sums of money as they shall think fit. Dalt. Just. 225. cap. 73.

† Upon a motion to quash an order for charging several parishes to contribute to the relief of the poor of another parish, it was said by the Court, that such a contribution may be by a *gross sum yearly*. Comb. 242. Hill. 5 W. & M. B. R. Anon.—Poor's Settlements, 152. pl. 202. cites S. C.—Shaw's Parish Law 216. cites S. C.

5. Holt Ch. J. said, that possibly a *place extra-parochial* may be tax'd in aid of a parish; but a parish shall not be tax'd in aid of that. 2 Salk. 486. Hill. 11 W. 3. B. R. in Case of the Precinct of Bridewell v. the Parish of Clerkenwell.

relief of the poor of an adjoining parish, the tax must be by poll, every particular inhabitant by himself; but where it is laid upon a hundred it is otherwise; because there are officers who may proportion what every body is to pay. MS. Cases. The Queen v. the Inhabitants of Clarendon Park and the Hundred of Cudworth.—But at another day the Court held that the reason was, because the parishes were taxable by themselves at the common law, and that in the said case the inhabitants of an *extraparochial place* may be taxed in general, and that they may proportion the particulars upon every inhabitant, or the tax at first may be laid upon every person by himself, but the Justices cannot appoint two persons to do this, and that the money shall be levied on such and such; and being thus appointed, the order was quashed. Ibid.

6. In a city where one parish is not able to relieve their poor, the next parish being able is to aid them by a weekly allowance, but when the cause ceases such allowance is to cease also. Just. Case Law 234. cites Black. 260, 262.

7. In case a parish is not able to maintain its own poor, two Justices may tax any other parish within the hundred towards their

their relief, and if the hundred be not of ability to relieve their parishes, the Justices in their sessions may tax any other parish or parishes within the county. 2 Shaw's Pract. Just. 42.

2 Shaw's Pract. Just. 28. cites S. C.—Shaw's Parish Law 199. cites S. C.—*It must appear that the parish which prays in aid of another was not able to pay sufficient sums, and there must be an assertion or adjudication that it appeared so to them.* MS. Cases, *Consett v. St. Mary's Lincoln.*

8. An order was made by the Justices of the borough, for the parish of St. Peter's to pay to the officers of St. Mary's the sum of 20s. weekly, until we the said Justices shall see fit to order to the contrary. It was objected, 1st, That it does not appear that the parish of St. Mary's is *overburthened with poor*; but over-rul'd; for the order follows the words of the statute. 2dly, It is said, that they are Justices of the town and borough, and it appears upon the order that the parish of St. Mary's is within the borough, but not within the town and borough. But per Cur. they are Justices of both. 3dly, The order is, until we shall see fit to order the contrary, where the act never gave the Justices such an authority, and it is in effect making a perpetual order; for if one of the Justices die or be remov'd, no other Justice can alter it till they the said Justices shall see fit to alter. And it was quash'd per Cur. for the last objection. Poors Settlements 121. pl. 165. Pasch. 12 Geo. 1. The Inhabitants of St. Peter's and St. Mary's in the Borough of Marleborough.

[For more of Poore in general, see Apprentices, Bastards, Overseers, Removal, Sessions, Settlements, and other proper Titles.]

See (B).

(A) Raised. How. By Sale or Mortgage &c.

1. **P**ortion charged by virtue of a power [was decreed] to be raised by sale or mortgage and not by perception of profits. MS. Tab. cites February 28th, 1701, or 1707. Kelly v. Ld. Bellew.

In this Case no express time was limited when the 8000l. portions were payable, but then a further

2. A term of 99 years was by marriage settlement created, and vested in trustees for making provision for younger children, whereby in case of both sons and daughters, the daughters were to have 1000l. each, at the age of 21 or marriage; and and if no son and but one daughter, she to have 5000l. but if more daughters, then 8000l. between them, to be raised out of the rents, issues and profits as soon as conveniently could be. The

fathers

father died without issue male, leaving 3 daughters; and on a bill brought by the 3 daughters, it was urged that the 8000l. should be raised by mortgage or sale, because here was a time limited for payment, viz. on the death of the father without issue male; for that then says the deed the portions shall be raised as \*soon as conveniently they may, which is in judgment of law presently; and of the same opinion was the Ld. C. Parker, and so decreed it. Pasch. 4 Geo. 1. 10 Mod. 401. Ashton v. . . . .

trust was declared of the term for raising 1000l. a piece for daughters, payable at 21 or marriage, in case of there being no

son; and the term was not made without impeachment of waste. It was said by the counsel for the plaintiff, and so ruled by the Court, that the daughters were purchasers of their portions by their mother's marriage and portion, but the limitation to the defendant, who was brother to the grantor, was voluntary; that the meaning of the word (portion) is a provision for marriage, but the leisurely way of raising money by yearly profits would not answer such end; that the words (profits of lands) especially when to pay portions or debts, imply any profits which the land would yield, either by selling or mortgaging; that though the words (yearly profits) might make a difference, yet the word (yearly) was here omitted. Wms's Rep. 415. &c. Pasch. 1718. Trafford v. Ashton.

\* But where the term was for raising portions for daughters by rents and profits, or by sale or mortgage, and to be paid at the daughters age of 18 or marriage, provided that no maintenance should commence till death of the father, but at the quarter day after; and provided, if all the daughters die between 18 or marriage, then the term to be void; and a power with consent of trustees to revoke the uses. The mother died leaving no son, and but only one daughter, who married J. S. Lord Macclesfield thought that the portion (being 3000l.) remained yet subject to a contingency, and therefore not to be raised till this contingency is out of the case, which cannot be done during the father's life; and the words of the clause for paying the portion being [tho' they are not taken into the state of the case in the report] viz. That the same shall be paid at the daughters age of 18 or marriage, or as soon after as conveniently may be, his Lordship inferred, that it was not to be raised till it could be done with convenience, and said, that in his opinion it cannot conveniently be raised by selling a reversion, which will incommode the family to that degree as to ruin the estate, and so declared that he thought it could not be conveniently raised till the father's death. Hill. 1722, 2 Wms's Rep. 93. to 102. Reresby v. Newland.—Affirmed in the House of Lords. Ibid.

3. A. pursuant to marriage articles settled lands on himself for life, remainder to his wife for life, remainder to the first &c. sons &c. remainder to trustees for 120 years for raising 1500l. for daughters portions, viz. out of the rents and profits of the premises, as well by leases for one, two, or three lives, or any number of years determinable thereon, or for 21 years absolutely at the old rent. They had only one child, viz. a daughter named M. [It seems that the wife was dead tho' not mentioned] A. having reserved to himself the reversion in fee, settled the same expectant on his own death without issue male, and subject to the 120 years term, to trustees, for 10 years, remainder to B. his nephew for life, remainder to his first &c. son in tail male, remainder to C. grandson of A. and son of M. in tail male, remainder to A. in fee. The 10 years term was, that if M. and her husband would release the 1500l. then the trustees should raise 1000l. viz. 1500l. to be vested in land for the benefit of M. and her husband, and the other 400l. be to paid to the husband of M. A. died without issue male, leaving C. his executor, M.'s portion not being paid; B. enter'd and enjoy'd for 4 years, the portion still unpaid. The surviving trustee died, and M. having administered to him, she and her husband, and B. assign'd the term of 120 years to J. S. who advanced the 1500l. B. died without issue male after 7 years possession but left no assets. The question was, whether the money could be raised by mortgage, or any other way by the words of the

Chan. Prec. 583. S. C.—MS. Tab. cites February 5, 1723. S. C. That the trustees raised the whole money by mortgage of all the term; that the mortgage was set aside, and decreed [ 433 ] to account for the rents and profits, there being an express provision that the monies should be raised by rents and profits; besides the power to make leases for

21 years, shows that they could not mortgage for the whole term. In some cases, where it is doubtful, the whole term may be assigned, but here it is apparent. — The Reporter says, that this decree was afterwards affirmed in the House of

Lords, though thought a very hard case. 2 Wms's Rep. 21. — S. C. cited by the Master of the Rolls. Hill. 1731. and concluded, that there was not one single precedent where a sale had been decreed of a trust-term for a portion appointed to be raised by rents and profits, and no time limited for payment. 2 Wms's Rep. 604, 605. in Case of Evelyn v. Evelyn.

Trustees being to pay the daughters portions out of the rents and profits, it was objected that they had not power to sell; to which the Court replied, that the trustees were not to pay the portions out of the annual rents and profits, but out of the rents and profits, and those portions were to be paid at prefixed days, which the annual profits would not do; and therefore conceived the trustees might sell for that purpose within the intention of the trust. Chan. Cases 176. Trin. 22 Car. 2. Backhouse v. Middleton.

trust, than by annual profits or leasing? Ld. C. Macclesfield said, he thought it material to know the yearly value of the premises, and that he took it to be a rule, that *where a trust of a term for raising portions directs a particular method, it implies a negative that they shall not be raised any other way*; and when it is as here to raise by leasing &c. it shall not be any other way; and that it is considerable that even by leasing it could not be raised but by reserving the old rent; that the *natural meaning of raising a portion by rents, issues and profits is by the yearly profits*; but to prevent an inconvenience, the word (profits) has in some particular instances been extended to any profits which the land will yield, but not where restrained by subsequent words. And his Lordship observed, that at the time of making this settlement, (viz.) in 1657, he thought the word (profits) was not extended to signify profits to be made by sale or mortgage. Pasch. 1722. 2 Wms's Rep. 13 to 21. Ivy v. Gilbert & al.

4. When no time is limited for payment of portions, and the claimants are of very tender years, tho' the right to the portions vested in such infant daughters, yet they are to be raised by rents and profits; per the Master of the Rolls. 2 Wms's Rep. 603. Hill. 1731. in Case of Evelyn v. Evelyn.

S. C. cited by the Master of the Rolls. Hill. 1731. 2 Wms's Rep. 604. In Case of Evelyn v. Evelyn.

5. As where lands were limited to the husband for life, remainder to the wife for life, remainder to the first &c. son in tail male, remainder to J. S. in fee; provided that if no issue male, but a daughter be living at the husband's death, then the trustees should stand seised of the premises, to the intent that such daughter should receive 10000 l. out of the rents, revenues and profits thereof, and 100 l. a year for maintenance, and this 10000 l. to be for her portion, without appointing any time for payment. There was no son, and but one daughter, who died unmarried at 17. The 10000 l. was decreed to go to her executors, and to be raised out of the profits. Trin. 1688. 2 Vern. 72. Ld. Rivers v. Ld. Derby.

S. C. argued. Gibb. 131.

6. By settlement of the manor of W.—A. was tenant for life, remainder to his first &c. son in tail male, with a power to A. to charge the same with 6000 l. by lease mortgage or otherwise, without restriction, and with a power to every one of the sons when in possession to limit a jointure of 100 l. a year for every 1000 l. and to make leases sans wast (but without prejudice to any jointure to be made) for raising daughters portions not to exceed their mother's fortune, and the leases not to take effect until failure of issue male of such son making such lease, with power to any in possession to lease for 21 years at the most improved rent. A. by another settlement of other

other lands made the day following limited the same to the same uses, \* with this difference only, viz. that as to the son's power of leasing for raising daughters portions, these words were added (*so as such lease or leases should cease and determine upon the raising of such portions* and costs and charges for raising of the same). A. died, and upon the marriage of B. the eldest son, he by virtue of the power limited a term of 500 years to trustees to commence from and after failure of issue male of the said B. and by and out of the rents, issues and profits, or by sale, mortgage, or lease, or otherwise, as soon as conveniently might be after his decease, raise 8000 l. (so much being his wife's fortune) for daughters portions; proviso that the term shall not prejudice the jointure, and that immediately after the raising the term shall cease.—B. died leaving 3 daughters but no son, who at about 4 years of age brought their bill against the remainder-man in tail for a present sale of the 500 years term, —It was agreed by Ld. C. King, Ld. Ch. J. Raymond, and the Master of the Rolls, that the 8000 l. should be raised out of the rents, issues, and profits of the 500 years term, and not by sale or mortgage; and that no more than 8000 l. should be raised in the whole, and the profits to be accounted from the death of B. The Master of the Rolls, took notice of the different limitations in the two several settlements, and that thereby it was plain, that a sale was not intended by B. and that it was not possible that the term could cease upon raising the portions in any other sense or way than by raising them out of the growing profits. And Ld. Ch. J. Raymond relied much on the intention of the maker of the settlement, which appeared to be plainly to preserve the estate in the male line, and so thought it would be extreme hard to decree what would be the destruction of the estate against the intention of the party. Hill. 1731. 2 Wms's Rep. 591. 598. to 605. Evelyn v. Evelyn.

(B) At what Time to be raised or paid.

See (A).

1. BY marriage settlement, a term is limited to raise 5000 l. if but one daughter, to be paid at 21 or marriage, which should first happen after the decease of the father and mother, or within six months after either of those days or times. There was only one daughter, and the father dy'd. Daughter comes to 21; decreed the 5000 l. to be raised, tho' the mother was living. 2 Vern. 458. Hill. 1703. Gerard v. Gerard.

S. C. cited Wms's Rep. 451. Arg.—S. C. cited 2 Vern. 658. Trin. 1710. and 3 Ch. R. 200. 203. —S. C. cited 2 Vern. 641.

in Case of Corbet v. Maydwell.—and ibid. 655. in Case of Hickman v. Anderson, where this is said to be a strain.—S. C. and it being insisted, that the portion ought not to be raised till after the decease of the mother, because this term did not take effect in possession till after her death, and it is appointed to be raised out of the rents and profits &c. and if it might be raised in the life of the mother, it might so have been in the life of the father; but it was answered, and so held by the Court, that it could not be pretended to be raised in the father's life, because the term, which was the fund to raise it, vested in contingency till after the death of the father, it being to vest on his dying without issue male, and leaving issue female; but where a term did vest, though it was in reversion after the decease of the father, yet the money being payable at a certain time, as at 21 or marriage, there it had been decreed to be raised even in the father's life-time; and that so it was in the Lord TRAVERS' CASE, and also a Case of \* HILLIARD v. JONES, where it was so resolved in an appeal to

the House of Lords. And though the first clause for payment of the portion, had it stood single, had been pretty plain, that it could not have been paid till after the decease of the father and mother, yet by the subsequent words it seems to be intended, that it should have been paid in, their life-time, upon marriage, in case such marriage had been with consent. And so the intent appearing upon the whole deed, and being for a portion, it was ordered to be raised by sale in case the heir at law did not pay it. 2 Freem. Rep. 271. pl. 340. Gerard v. Gerard.

\* A settlement was made to husband for life, remainder to the wife for life, remainder to the first and other sons in tail male successively, remainder to trustees for 200 years; and the term was declared to be upon trust, that the trustees, after the death of the husband and wife, should out of the rents and profits raise and pay 4000*l.* for younger children, at their age of 21 years, unless the person in remainder should raise and pay the same; and the term was decreed to be sold, and the portions raised in the life-time of the father and mother. Mich. 1 W. & M. Abr. Equ. Cases 337. pl. 2. Heliar v. Jones.—S. C. cited Wms's Rep. 451. Arg.—2 Jo. 201. GREAVES v. MATTISON, S. P. and the introductive words were, In case the said father should die without issue male, then the trustees should out of the rents and profits raise 5000*l.* and 200*l.* per annum for main-

[ 435 ] tenance in the interim. The wife died, leaving one daughter; and per three Justices against one, the portion was to be raised immediately, though the father was living, the daughter being married.

S. C. cited 2 Vern.

641. 658.

In Case of

Corbet v.

Maidwell.

—S. C.

cited 3 Ch.

R. 201.—

S. C. cited

per Cowper

C. 3 Ch.

Rep. 203.

who said, if

the Case of

GREAVES

and MAT-

TISON, or

of STANI-

FORTH and

STANI-

FORTH, had been *res integra*,

he should not have gone so great a length. —Approved by Ld. C.

Parker. Wms's Rep. 452.

2. Lands limited on marriage to husband and wife for their lives, remainder to the heirs male of their bodies, and if no issue male of their bodies, and one or more daughters, then to trustees for 500 years from the decease of the survivor, in trust to raise by sale or mortgage 1000*l.* for daughters portions, but no time for payment. The father died leaving one daughter and no son of that marriage; per Master of the Rolls, The term arose on the decease of the father without issue male, tho' not to take effect in point of profits till after the decease of the mother; but the portion is vested in the daughter, tho' the mother is living, And decreed to raise it by a sale with a reasonable maintenance in the mean time not exceeding the interest of the portion from the death of the father, or at least from the time the portion might have been raised by a sale. 2 Vern. 460. Hill. 1703. Staniforth & al. v. Staniforth.

3 Chan.

Rep. 196.

to 206.

S. C. ac-

cordingly.

—2 Vern.

640. and

641. S. C.

accordingly.

—Abr.

Equ. Cases

337. pl. 5.

S. C.—

\* S. P. tho'

it be a term

in remain-

der, and not

impossible;

per Cowper

C. and says,

that in the

Case of †

HELIARD

v. JONES,

3. A. upon his marriage settled lands to the use of himself for life, remainder to trustees for 500 years, remainder to the heirs-male of his body by his intended wife, and if he should happen to die without issue-male of his body by his wife, and there should be one or more daughters of their two bodies, which should be unmarried, or not provided for at the time of his death, such daughter (if but one) should have 2000*l.* and 30*l.* per annum, issuing out of the profits till the portion should become due; the portion to be payable at the age of 18, or day of marriage, and a power for the trustees to raise it by sale or mortgage of the term, or perception of profits. The wife died leaving but one daughter of this marriage, and no son, and the daughter being above 21 married to the plaintiff. The question was, whether the trustees could raise her portion in the life of her father? And on great consideration it was held by the Ld. Chancellor, that tho' a term is limited in remainder to commence after the death of the father, yet if the trust is to raise a portion payable at the age of 18, or day of marriage, without question the daughter shall not wait the death of her father, but at the age of 18 or marriage may compel

compel a sale of the term. But in the principal Case, the daughter, who is the subject of this provision, must be a daughter unmarried or unprovided for at the time of the father's death, which is a contingency not yet happened; that this Case was too strong for the Court to attempt to get over, and to do it would create great confusion, and it would be to no purpose for any one to make deeds, if the argument of convenience or inconvenience should prevail to over-rule them; and therefore dismissed the bill. 1 Salk. 159, 160. Trin. 9 Annæ. Corbet & Ux v. Maidwell.

the question only was, when interest was to commence of a portion payable at 18 or marriage, and no contingency, and there no doubt interest was

payable, tho' the father was living. 2 Vern. 656, 658. in S. C.—† S. C. cited by the name of HATTEY v. JONES. November 14. 10 W. 3. and affirmed in the House of Lords. 3 Chan. Rep. 199.

Where the term and portion are both to arise on a contingency, as in the Case of STANFORTH v. STANFORTH, there, because a total failure of issue male between the parties & all that is contingent in the Case (for it is certain that all both must die), the portion shall be raised in the life-time of the father or mother at the day of payment, which was 18 or day of marriage, in regard the term must certainly vest, and can never be defeated by leaving of issue male; per Cowper C. 1710. 3 Ch. Rep. 204. in Case of Corbet v. Maidwell.

4. A. made a settlement to the use of himself for life, remainder to the use of his first son in tail male, remainder to trustees for 40 years, remainder to A. in fee. The term is declared to be in trust, that if A. should die without issue male of his body, then the trustees should raise 5000 l. for daughters portions, payable at 21 or marriage, with a provision for maintenance in the mean time. The wife died, leaving two daughters and no issue male; and resolved per 3 J. that the right to the portion was vested by the mother's death without issue male in the life of the father; for otherwise the father might live so long that the portions might be of little service. 2 Jo. 201. Greaves v. Mattifon.—cited 1 Salk. 160. Trin. 9 Ann. in Canc. in the Case of Corbett v. Maidwell.—In which case it is resolved accordingly, and further also, that if the trust of a term for raising daughters portions be limited to take effect in case the father die without issue male by his wife, and the wife dies without issue male, leaving a daughter, in such case the term is saleable in the life of the father. Ibid. 159.

Where the term is vested, and the portion contingent, as in

[ 436 ] the Case of GREAVES v. MATTIFON, there the failure of issue male shall tantamount the decease of the father without issue male of the body of his wife, and the portion be raised even

in his life-time, because payable at a day certain, and especially being directed by deed to be raised by sale thereof; per Cowper C. but he says they are concessions made by him, because he finds it has gone current so of late, but he thinks it of hard digestion. 3 Ch. Rep. 204. 1710. in Case of Corbet v. Maidwell.

5. Lands were settled on A. for life, remainder to such woman as A. should marry, remainder to first &c. son of A. in tail male, remainder to B. with a power for A. to charge 2000 l. for younger children; A. died, leaving only daughters, and by will charged the premises with 2000 l. payable at 21 or marriage. The daughters brought their bill to raise the 2000 l. out of the reversionary estate, and to have interest in the mean time for their maintenance. Ld. Harcourt, as to the bill praying to charge the remainder only with this 2000 l. portion, held, that the power, and charge made pursuant thereto, did affect the wife's estate —

\* See (C) S. G.

for life as well as the remainder, and that it was like a power of leasing which over-reaches all the estates; for which reason it is usual to insert a proviso in such power of charging, that it shall not prejudice the jointure or other precedent estates. Wms's Rep. 244 to 246. Hill. 1713. Beale v. Beale.

6. In a marriage settlement a power was lodg'd in trustees to raise 3000 l. for a daughter, to be paid her at the age of 21 or day of marriage, which should first happen, when A. and his wife should die without issue male, and in the mean time 100 l. per ann. to be paid her for her maintenance. Resolved per Ld. Chancellor Cowper, upon the authority of the Duke of Southampton's Case, that the words, when A. and his wife should die without issue male, amounted to a condition precedent, and that the time of raising the portion did not commence when one of them should be dead without issue male, and so the other be tenant in tail, after possibility of issue extinct; but when both of them should be dead without issue male. Resolved, that the mean time, in which the 100 l. per ann. was payable for a maintenance, must necessarily relate to the intermediate time between the raising the money and her attaining the age of 21 or day of marriage. 10 Mod. 314. Pasch. 10 Mod. 314. Pasch. 1 Geo. 1. Champney v. Champney.

10 Mod.  
433. S. C.  
—The  
words (commencement  
of the term)  
must be intended  
commencement  
in possession;  
per Ld. C.  
Parker.  
Wms's  
Rep. 452.  
S. C. —  
Where by  
marriage-  
settlement a  
term was limited in

7. Marriage settlement limited the estate to the baron for life, remainder to the wife for life, remainder to the first &c. sons, remainder to trustees for 500 years in trust, that after the commencement of the term, they should raise 4000 l. by rents or profits, sale or mortgage, for younger children, payable at 21 or marriage, first happening, remainder to the heirs of the baron. The baron dies leaving only one daughter; it was insisted that it was not to be raised till after the commencement of the term, and the term does not properly commence till it comes in possession, but was a vested remainder on the making the settlement, and was no contingent remainder; and decreed accordingly, that the portion was not payable till after the decease of the jointress, and would not carry interest in the mean time. 2 Vern. 760. Trin. 1718. Butler v. Duncomb.

[ 437 ] trustees to raise portions either out of the rents or profits, or by mortgage and sale, but the provision for maintenance was not to take place till after the death of the jointress, the portions were not to be raised in her life-time. Abr. Equ. Cases 340. pl. 7. — S. C. cited by Ld. C. Talbot, who said, that in this case the maintenance must precede the portion, and consequently the portion must wait the jointress's death; for if what was to precede must have waited, that which was to come after must do so likewise. Sel. Chan. Cases in Ld. Talbot's time. 32, 33. Pasch. 1734. in Case of Hebblethwaite v. Cartwright.

The Master of the Rolls decreed it to be raised by sale, unless the son should pray it to be done by mortgage; and

8. A. seised of White Acre in possession and Black Acre in reversion expectant on the death of J. S. devised White Acre to his wife for life, and the reversion of both after the respective deaths of his wife and J. S. to his son B. on condition to pay M. his daughter 1000 l. within 12 months after the death of W. R. and on default that M. may enter into White Acre and take the profits till paid. W. R. died, living the wife and J. S. After the 12 months from

W. R.'s

W. R.'s death, M. and her husband brought a bill for the portion, and the Master of the Rolls decreed it to be raised *by sale of the reversions*, with interest from the 12 months after the death of W. R. and said, that the clause of entry was only intended in case the estate for life fell in the mean time, so that she might thereby enter, but not to delay the payment of the portion till that time. Ch. Prec. 500. Mich. 1718. Bacon v. Clerk.

this decree was appealed from to the Ld. C. Parker, who affirmed the same. Wms's Rep. 478. Mich. 1718. Bacon v. Clerk.

9. A. on the marriage of B. his son settled 900 l. per ann. on himself for life, remainder to his son for life, remainder to trustees for 500 years, to raise portions of 10,000 l. a-piece if 2 daughters, payable at 21 or marriage, with maintenance in the mean time, to begin at such of the feasts as should first happen after the death of him and his son or either of them, and the same to be raised out of the rents and profits. B. has issue a son and a daughter, and dies. Ld. Chancellor thought it hard to decree a mortgage or sale of such reversionary interest, and that in well drawn settlements, it was restrain'd to the commencing of the term in possession; but as this was only for raising maintenance, he ordered it to a Master to inquire the value of the estate, and then to come back to the Court for further directions. Mich. 1718. Ch. Prec. 503. Lady Pierpoint v. Ld. Cheney.

This settlement was made by a private act of parliament, and the 20,000 l. was expressly mentioned to be raised out of the rents, issues, and profits, or by sale or mortgage; Lord C. Parker said, that tho' he

did admit that he must take the act as he found it, viz. the first quarter-day after the death of A. or B. the maintenance money is to be raised by profits, mortgage, or sale, yet that this Court, which is the guardian of the infant, must consider the good of the infant, which then not raising the maintenance in the present case may be; and said, that as Lord Cowper had declared, that in such case he would not go beyond the established precedents, as taking it that the Court had already gone too far, so he should observe the same rule, not having been able to find one single precedent for *mortgaging a reversion for maintenance*, and that it was less reasonable in the present case, because A. had offered in Court to maintain the daughter. Wms's Rep. 488. Mich. 1718. S. C.

10. A. in consideration of marriage and portion with M. settled lands to the use of himself for life, remainder to M. for life, remainder to the first &c. son in tail male, remainder to trustees for 500 years without waif, to raise 6000 l. for daughters portions by sale or mortgage, or by rents, issues or profits, to be paid at their age or ages of 21 or marriage if after 14. M. died leaving 4 daughters, but no son. The eldest daughter after 14 married the plaintiff. The daughters had other provisions left them by a grandmother. Ld. C. Macclesfield was very averse to the decreeing a sale or mortgage of this reversionary term, but at length (animo reluctante) decreed a sale or mortgage of a 4th part (subject to a power reserved to the father of making a jointure of 150 l. on a 2d wife) for raising 1500 l. and interest from the marriage; saying that tho' this was a matter of trust, yet since all the contingencies had happened, and it did not evidently appear but that the parties intended that the portions should be raised out of the reversionary term, he did not look upon it to be within the discretion of the Court, any more than in the option of the trustees, to raise the money or not, but that it was a thing not to be encouraged. And as to the matter of the other provisions left by the grandmother,

S. C. cited by the Master of the Rolls, Mich. 1728. saying, that nothing appearing in the trust of the term shewing it to be the intent of the parties that the portion should not be raised out of the reversionary term, the portion was decreed (tho' reluctante Curia) [ 438 ] to be raised in the fa-

ther's life-time. 2 Wms's Rep. 707 to 710. *Sandys v. Sandys*. Trin. 1721. Wms's Rep.

486. in *Cafe of Brome v. Berkley*.—So where there were the like limitations for payment of 2500l. at 21 or marriage, and that the trustees should also raise and pay 100l. by half-yearly payments for her maintenance and education, until her portion should be due, the first payment of the maintenance to be made at such of the said half-yearly feasts as should next happen after the said estate so limited to the trustees as aforesaid should take effect in possession. A. died leaving no son, and but only one daughter, who being 21, brought a bill in her mother's life-time for raising the portions with interest; but it was decreed by Ld. C. King, assisted by the Master of the Rolls, that it shall not be raised in the mother's life-time; for the maintenance is not to be paid till the trust estate comes into possession, and the maintenance must be intended to precede the payment of the portion, and so the bill was dismissed. Mich. 1728. 2 Wms's 484. *Brome v. Berkley*.—This decree was affirmed on appeal so the Lords in March following. Ibid. 485.

11. Where a portion is to be raised by annual profits or fines, if no time be appointed, the portion is due when the profits can raise it. Pasch. 1722. 2 Wms's Rep. 20. in *Cafe of Ivy v. Gilbert & al.*

12. A settlement was made for want of issue-male, to raise portions for daughters, to be paid at twenty-one or marriage, which should first happen, by and out of the rents and profits, or by mortgage or sale, as the trustees should think fit, and in the mean time to raise 100l. per ann. for the maintenance of each of them. The father died, and one of the daughters married the plaintiff, who brought this bill to have the portion raised, but was dismissed, because the portion being to be raised out of the rents and profits, or by mortgage or sale, plainly shewed that it was not to be raised till such time as the trustees might make use of the election given them by the settlement to raise it either out of the rents and profits, or by mortgage or sale; but during the life of the mother, who had it in jointure, they could not raise out of the rents and profits; therefore neither by mortgage or sale, which were all inserted in one and the same clause, and a discretionary power lodged in the trustees to use either the one way or the other, and till they had the election of using either of those ways, they had no power at all; besides that the maintenance being to precede the raising of the portions, if there was no maintenance to be raised in the mother's life-time, the portions were not to be raised in her life-time, as they were not to take place till after the maintenances. And my Lord Chancellor and the Master of the Rolls both said, that the Cafes on this head had gone too far already, and managled all estates, and that they would never decree portions to be raised in the father's life-time, where it could possibly bear any other construction. And this decree was affirm'd in the House of Lords. Abr. Equ. Cafes 340. Mich. 1728. *Brown v. Barkley*.

the term not being yet come into possession; that in this *Cafe of Brome v. Berkley*, the Lord Trevor delivered his opinion in the House of Lords, that in all such cases as this, where the portion is contingent, and the child marries, and then dies, the representative shall have it. Indeed in cases where the child dies so young that the portion could never be wanted, the Court will not decree it to be raised, because there is no occasion for it, as in *Cafe of Brewen v. Brewen*, and in that of *Tournay v. Tournay*; but that there is no precedent where the Court has decreed so

Cases in Chan. in Ld. Talbot's time 122. his Lordship said, that in cases where the portion is to be raised out of the reversionary term after the tenant for life's death, and to be paid at twenty-one or marriage, and the child marries, and then dies, it would be hard to decree it to merge; that in *BUTLER AND DUNCOMB'S Cafe*, 2 Vern. 760. a sum was borrowed by direction of the Court, to assist the husband in his trade,

hardly

*hardly with a child who dies after marriage, as to take away what was intended for his provision. And that a future interest is an interest, tho' not so good as an interest in possession, and it is and may be a consideration of marriage; that tho' such an interest does not absolutely vest, yet it is casting it too far to say it does not vest at all, or so as that it may not be transmissible.*

13. Where a particular certain time is limited for the payment of a portion, it may imply a power of sale. Per the Master of the Rolls. Hill. 1731. 2 Wms's Rep. 601. in Case of Evelyn v. Evelyn.

14. A. on marriage with M. settled his estate to the use of himself for life; remainder to his first &c. sons in tail male; remainder to trustees for 1000 years; remainder to B. his brother &c. The trust of the term was declared to be that in case of *no issue-male of the bodies of A. and M. which should live to twenty-one, or be married, and have issue, and that there be one or more daughter or daughters, then such daughter, if but one, should have 4000 l. and if two or more 5000 l. between them, at twenty-one or marriage, which should first happen. And if one only, then she to have 100 l. a year for maintenance; and if two, or more, then the like sum of 100 l. to be paid half-yearly in equal shares till their respective portions should be raised and paid; and in case of non-payment of the portions, then the trustees, their executors &c. out of the rents or profits, or by mortgage or sale of the premises, or any part thereof during the term, to raise and pay the several portions before limited. Provided if A. should in his life-time prefer them in marriage with portions equivalent, or that the remainderman after A.'s death should do the like, or that no daughter should live to twenty-one or be married, then the term to cease.* M. died living A. leaving no son, but three daughters, who are all \*unmarried. The question was, if the portions were to be rais'd in A.'s life-time? Lord Chancellor said, that the raising or not raising must, according to the different decrees as to this point, depend upon the particular penning of the trust. That in this case all the contingencies precedent to the raising the portions have happened, as that of not having issue-male (by reason of the wife's death without such issue, which in this Court is deemed a total failure of male between them), and also the daughter's marrying, or attaining the age of twenty-one &c. That A.'s death is made no part of the condition; and tho' the raising it out of the rents and profits cannot be done during A.'s life; and that the mortgage or sale is to be during the term, which is not to commence in possession till A.'s death, yet they † may be raised in A.'s life-time, it being no-where said that the portions should not be raised till after such time as the term should take effect in possession: that indeed had there been no express authority given to the trustees to sell or mortgage, there might have been some difficulty, but now they may do either; and that the proviso to make the term void, in case A. in his life-time should prefer the daughters in marriage with portions equivalent, will not control such power of the trustees. And so decreed the portions to be raised, with interest from

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\* So the Case is stated, fol. 32. but by what is said by Lord Chancellor, fol. 33. it appears that they were all married and 21.

† S. P. 1. Salk. 159. Trin. 9 Anne, in Canc. in Case of Corbet & Uz. v. Maidwell.

from M.'s death, at which time they first vested. Sel. Chan. Cafes in Lord Talbot's time. 31. Pasch. 1734. Hebblethwaite v. Cartwright.

See (1) Rolt v. Rolt.

(C) *How much to be raised and paid. And Maintenance, in what Cafes.*

1. A. Made a lease in trust with reference to his will, and thereby devised to several of his daughters 500 l. a-piece to be paid at 21 years or marriage, and if any or all died before, then to others. The daughters had no other portion, nor no maintenance; and direction was prayed by the trustees, whether they might allow the daughters maintenance? The Lord Keeper said, No; because of the devise over; else it might have been done. Chan. Cafes 249. Hill. 26 and 27 Car. 2. Leech v. Leech.

So marriage settlement was in trust, that if the husband should die without issue male, then the

2. A. was to give, if one daughter 10000 l. if two daughters 12000 l. if three daughters 20000 l. He had three daughters, and one dy'd; and the question was, if the two daughters shall have 12000 l. a-piece or 20000 l.? and decreed they should have 20000 l. per the Ch. J. Skin. 39. Pasch. 34 Car. 2. B. R. cites it as Stowell's Cafe.

trustees should raise 5000 l. if but one daughter, but if more, then 6000 l. to be equally divided, and to be paid at marriage or 21, and 200 l. per ann. for maintenance in the mean time. The mother died, leaving two daughters; one died living the father, and before 21 or marriage; the other daughter married, but unknown to the father; and then the father died. Per three Justices [ 440 ] against Jones J. the daughter shall have 6000 l. For 1st. The interest vested in the two daughters, on the death of the mother. And 2dly, The trustees after the mother's death, and living the father, might sell their interest in the term, to take effect after the father's death, and on the contingency of marriage, or living to 21, 2 Jo. 201. Greaves v. Matison. — 3 Ch. R. 198. S. C. cited. — Skin. 38. S. C.

3. By marriage articles the wife was to have 500 l. per ann. jointure, or 5000 l. in money. She elected the 5000 l. and it was decreed; and she had a sequestration of defendant's lands, and a writ of assistance to put her in possession, and a decree against defendant, then an infant, for maintenance for his younger brothers and sisters; and this was to be paid out of the sequestered estate. On appeal the Lords reversed this decree, as to the maintenance, which had been paid to the wife, and which she had applied for the children's maintenance. North K. on the account coming back, allowed the principal sums for maintenance towards sinking the 5000 l. but would not let them be applied at the time they were paid, but in one intire sum at the end of the account, and so struck off all the interest for above sixteen years, which came to more than the principal, saying it was a hard case, and that damages were in the power of the Court. Vern. 160. Pasch. 1683. Dacres v. Clute.

4. Where an infant recovers by decree of the Court, the Court may, with the approbation of the infant's relations, allot him a maintenance, tho' no provision in the trust be for that purpose, and

and this is founded on natural equity. 2 Vern. 236. Trin. 1691. Englefield v. Englefield.

5. A term was raised by a power in a marriage settlement for provision of portions for younger children, to be paid at such time as the trustees in their discretion should appoint for their better maintenance and preferment. The children are to have maintenances out of the trust estate, and money employed for placing out a child shall also be allowed. Ch. Prec. 213. Hill. 1702. Warr v. Warr.

6. By a marriage settlement after the common limitations to the first and other sons, a term was limited to trustees for 300 years in trust, on failure of issue male, to raise with all convenient speed 3000 l. for daughters portions, to be paid at 18, or marriage. The mother dies; then the father dies, leaving no son but two daughters, and by will gave them 500 l. a-piece payable at the same time as their original portions, and devised the estate to B. a nephew. They were under 18 at their father's death. *Ld. Harcourt* held that the \*father surviving his wife, the daughters should have interest or maintenance (call it which they would) from the father's death, and referred it to a Master to see what maintenance was reasonable, and decreed the original portions to be raised, and interest to be paid at 5 l. per cent. only, being charged upon land. Ch. Prec. 367. Pasch. 1713. *Greenhil v. Waldoe*.

*might charge 2000 l. payable at such time and in such proportions as A. should direct. A. marries M. They have issue two daughters. A. appoints 2000 l. to be paid to them at 18 or marriage; A. dies. The mother was living, and the daughters under 18, and unmarried. Lord Harcourt had decreed low interest of 3 l. per cent.; and on a rehearing by Lord Cowper for greater interest, he said he thought the former decree was very tender, and was rather a recommendation to the mother to make an allowance, than a decree to charge her jointure therewith; but since they were not satisfied, he could decree no more than in strict justice they could demand; and that they could not charge the jointress till 18 or marriage. Pasch. 1715. Ch. Prec. 405. Beal v. Beal.—Wms's Rep. 244. S. C. Hill. 1713. [but says nothing of Lord Harcourt's opinion as to this point.]*

7. If there be one or more sons, and but one daughter, such daughter to have 500 l. and to every other younger daughter 200 l. a-piece in a deed of settlement; there being three daughters, the eldest shall have but 200 l. the estate being small, and not able to bear a greater charge. *Mrs Tab. tit. Portions, cites April 26, 1721. Chamberlain and White.*

(D) How much to be raised or paid. *Accu-* [ 441 ]  
*mulative.* See *Accu-*  
*mulative.*

1. A Deed is made for raising portions for daughters; afterwards a new provision is made by a second deed, and a will to which the deed refers. The prior deed is barred by the second deed. 2 Ch. R. 8. 20 Car. 2. Every v. Gold.

2. On marriage of T. with M. a settlement was made, by which a term of 99 years was created for daughters portions, and for

for want of issue male of the marriage, the remainder *in tail* was limited over to a *distant relation*. The deed declared the uses as follows, viz. If T. die without issue male, or having such issue male by M. if such issue should die in minority, or unmarried, the trustees should out of the premises raise and levy 2000 l. for the portion and portions of such daughter and daughters, together with a *competent yearly maintenance* for every such daughter and daughters, *not exceeding 20 l. per ann. and the 2000 l. to be paid at 21 years or marriage, which should first happen; proviso if the said T. B. in his life-time, or any to whom the immediate remainder &c. should appertain, should within twelve months next after the death of the said T. B. without issue male by the said M. either pay or secure the same, and the said maintenance to the liking of the said trustees, then the said term to cease.* T. died, having a son [and E. a daughter]; the son died without issue, E. his sister then living, and many years after, *but died at 19.* M. the mother took administration to E. and the bill was to have the 2000 l. and the 20 l. for so many years as E. lived; for G. in remainder had entered and received the profits, but not paid the 20 l. nor maintained E. The Lord Keeper decreed for the plaintiff as to the maintenance, notwithstanding that her *grandfather J. had by this will given the said E. 2000 l. so as she needed not maintenance; but as to the 2000 l. dismissed the bill.* 2 Chan. Cases 166. Trin. 36 Car. 2. in Canc. Bond & Ux. administratrix of Elizabeth, daughter of Mary, the former wife of Thomas Brown.

3. By a marriage settlement, a *term for years expectant* on failure of issue of M. is raised for securing 3000 l. for daughters not preferred in the life of the father, payable at 18, or marriage; there are a son and two daughters; the father in his life, by sale of lands raised 1800 l. for his daughters, which by another deed was payable at 21, or marriage; he left also a son of a former marriage; the younger son died an infant. Decreed the 1800 l. to be taken in part of the 3000 l. 2 Vern. 255. *Jesson v. Jesson.*

4. A. upon marriage settled his estate, subject to portions for younger children, and afterwards purchases another estate, and subjects it to like portions. It was decreed to be only a double security, and not a double charge; cited by Mr. Vernon. G. Equ. R. 66. as the Case of *Jesson v. Jesson.*

5. Marriage settlement on A. for life, remainder to the first son &c. in tail male, remainder to trustees for 500 years, to raise 5000 l. for daughters portions, payable at 18, or marriage, remainder to A. in fee. After the marriage A. settles other lands, and a like term is created for raising the like sum for daughters on like failure of issue male payable at sixteen, or marriage. A. dies and leaves a daughter his heir at law, who after eighteen dies unmarried; the trust of the term is not merged in the fee, but the portion shall go to the daughter's executors, and is disposable by her will; but there shall be but one five thousand pounds raised, but

S. C. cited G. Equ. R. 65. 66. Arg. A. settled an estate, and charged it with 3000 l. for grand-daughters on failure of issue male of B. his son, payable within a

but to take by which of the two settlements she thought most to her advantage. Per Somers C. and after affirmed in Dom. Proc. 2 Vern. 348. Thomas v. Keymish.

*year after marriage, or at 21, which should first happen.*

B. on his marriage settled the whole estate (including what was charged with the 5000*l.*) and on failure of issue-male to raise 3000*l.* for daughters, payable \* at 18, if then married, or when married after. B. had only one child M. a daughter, grand-daughter of A. and devised all his lands to C. a kinsman in tail-male chargeable with legacies, and devised to M. his daughter for her portion 2000*l.* viz. 4000*l.* to be paid at 18, and 4000*l.* at 21, or in a year after marriage, and also gave her 200*l.* a year for her life. Tho' it was urg'd that these sums were payable at different times, and some less beneficial than others; and that therefore all these portions, or at least the 5000*l.* given by A. the grandfather, and the 2000*l.* given by B. the father, shall be paid to her. But Lord Harcourt decreed that she should only have one portion, and not two, but that she may when of age elect which she shall think the most for her advantage. Wms's Rep. 147. Trin. 1711. Copley v. Copley.

6. By marriage settlement a term was to commence after the death of the survivor, to raise 3000*l.* in twelve months for daughters portions. There was only one daughter, and the father by will devised the trust-lands to make good the wife's jointure, and to raise 3000*l.* for his daughter's portion. Per Curiam, The will shall be taken as relative to the settlement, and as a better security of the first 3000*l.* and not as a devise of another 3000*l.* 2 Vern. 439. Bruen v. Bruen.

Chan. Proc. 195. S. C. —Freem. Rep. 254- S. C.

7. On the marriage of A. with M. a term of 500 years was limited to trustees to raise portions for daughters in case of no issue-male by the marriage payable at 18, with maintenance at the rate of 40*l.* a year to each daughter, from the death of their father and grandfather by the mother's side, until their portions should become payable. A. died, leaving two daughters, one of eight and the other of nine years old; some time after the grandfather died. The father by his will had made another provision for the daughters, and lands also descended from him. But Lord C. Macclesfield held this not material, as long as by the settlement there was no other provision except this maintenance money, until the portions should become payable, and any matter subsequent to the settlement ought not in justice to vary the construction thereof. 2 Wms's Rep. 179. Trin. 1723. Ravenhill v. Dansey.

8. A provision was made by a marriage settlement for daughters portions, and after a further provision was made of a further sum amounting to half of the first sum, and this is made by the father's will by virtue of a power in the marriage settlement: the less sum was certain, the greater was on a contingency which happened after the less was to be received. It was insisted that in case of double portions there is no instance where the second provision is less than the first, that ever it was held a satisfaction. And Tracy J. who sat in the Lord Chancellor's absence, held accordingly; and observed, that in all the Cases cited, the second sum was more, or at least equal to the first provision; and so decreed both sums to be raised, and that the greater sum be raised with interest and costs from the time the contingency happened, which was the death of the brother within age and without issue-male. Cases in Chan. in Ld. King's time. 32. Trin. 11 Geo. 1. 1725. Savile v. Savile.

9. An objection arising from double portions holds only where both portions come from one and the same person. Barn. Chan. Rep. 156. Trin. 1740. Per Lord Chancellor, in Case of Sir Robert Walpole v. L. Conway.

(D. 2) *Maintenance, or Interest, payable in what Cases, and from what Time.*

Where portions are to be raised out of the rents and profits, no interest is to be allowed till the whole is paid.

March 13. 1745. Bagnal v. Bagnal. —\* In another MS. it is (raised.)

1. A TERM of 40 years was limited for raising 2000 l. either by profits or sale of the term; the trustee takes possession, and swears he made no interest of the profits. Lord Somers decreed that no interest should be paid for the 2000 l. because the trustee was admitted into possession. But this decree was reversed, because the trustee had power to have raised it immediately, and the estate was sufficient. MS. Tab. tit. Interest, cites 26 Jan. 1702. Lord Roseberry v. Taylor.

Where portions are limited by deed to be raised as soon as conveniently they may be, they are due in judgment of law presently, and carry interest from that time. Pasch. 4 Geo. 1. 20 Mod. 402. in Case of Ashton v. ....

2. A. by marriage settlement limited lands to himself for life; remainder to M. his wife for life; remainder to trustees for 99 years; remainder to his first &c. son; remainder to the first &c. son of B. his brother. The 99 years term was, that if there should be no issue-male of the said marriage, but there should be one or more daughters, the trustees should raise 8000 l. for the daughters to be paid as soon as conveniently could be, but limited no express time when payable. But then a further trust of the term was declared, that if there should be a son and a daughter, or daughters, the trustees should as soon as possible raise 1000 l. a piece for the daughters payable at 21 or marriage. A. and M. both died, leaving three daughters, but no son, the daughters being 21. On a bill brought by the daughters, it was insisted by the counsel for the plaintiffs, that the portions being payable presently on A's death (the daughters being then 21), they consequently would carry interest, and the rather since they were to arise out of land which yielded rents and profits, and so [as it seems] it was ruled by the Court; and Lord C. Parker farther observed, that the trust also was, that if there were a son and a daughter, or daughters, by the marriage, the son was to pay interest to his sisters for their portions from their age of 21 or marriage; and he said it could not be imagined that A. would be kinder to his nephew, in excusing him from paying interest, than to his own son, if he had one, who was bound to pay interest; and decreed the portions to be raised by sale or mortgage, as should be agreed by the Master and the parties, with interest from A's death, and costs. Wms's Rep. 415 to 420. Pasch. 1718. Trafford v. Ashton.

3. Where a portion is to be raised by annual profits &c. if no time be appointed, the portion is due when the profits can raise it, and it carries no interest in the mean time. Pasch. 1722. 2 Wms's Rep. 20. in Case of Ivy v. Gilbert.

4. A term of 500 years was limited to trustees to raise portions for daughters, in case of no issue-male by the marriage, by sale, mortgage or profits, and also with maintenance at the rate of 40 l. a year to each daughter, from the death of their father and mother's father, until their portions should become payable, to be raised by rents and profits. The father died, leaving two daughters; the one about eight, and the other about nine years old. Afterwards the mother's father died, and then the term commenced in possession. Lord C. Macclesfield declared it to be against his opinion to raise a portion or maintenance by selling a reversionary term under colour of the word Profits; but said that here the trust term was come into possession, and comparing it to a rent granted out of a reversion to commence presently, in which case tho' the reversion falls not into possession until many years after, yet when it does fall, it shall answer all arrears; and so directed the arrears of the maintenance money from the time the same became payable by the settlement, to be raised out of this term. 2 Wms's Rep. 179. Trin. 1723. Ravenhill v. Dansey.

5. A particular certain time being limited for payment of a portion, it carries interest from that time. Per the Master of the Rolls. Hill. 1731. 2 Wms's Rep. 601. in Case of Evelyn v. Evelyn.

(E) Who is intitled by the Limitation, and how. [ 444 ]

1. A Widower settles lands to raise 100 l. per ann. to his eldest son, and 100 l a-piece for his younger children, to be paid according to their seigniority; and afterwards he marries again, and has children by his second wife: it was decreed, that the children by this second wife were equally intitled with the children of the first to have the benefit of this provision for younger children; and that in case there should happen a deficiency, the eldest should not have more, and the younger less, but they should be all paid in average. 1 Vern. 334. 335. Mich. 1685. Brathwaite v. Brathwaite.

2. Five hundred pounds was settled in trust to pay the interest to the wife for life, and after her death to pay the principal and interest to such daughters as shall be begotten on the body of the wife, share and share alike; but if the husband die without any daughters, then the money to be paid to the wife. There was a daughter at the time of the settlement, who was living at the husband's death, and no other daughter was born afterwards. Per Parker C. the daughter tho' born before the settlement is intitled by the words. 10 Mod. 398. Pasch. 4 Geo. 1. Slingsby v. . . . .

See (B)  
pl. 8.

(F) *Liabie. What is.*

1. **WHERE** a term was limited for 99 years to raise portions, and that term happened to commence at the same time with a former estate for 99 years, so that the latter term proves void, Finch C. decreed the money should be charged on the first 99 years; for the limitor intended the raising it, and had power to charge the first term with these portions, as well as the other charged thereon, and said he regarded only the party's intent to raise the money tho' he pitched not on proper means. Chan. Cases 290. Mich. 28 Car. 2. Bisco v. Earl of Banbury.

2. A term for raising 10000 l. for a portion was so short, that the ordinary profits of the land would not raise half the sum; but there was a coal-mine open at the father's death, which the Court ordered to be wrought, and the trustees to make drains &c. in any other lands of the heir as need required, and to be done orderly, and so to raise the money. And per Ld. Hutchins. where the usual profits will not raise the money appointed within the time, this Court may order timber to be felled off the land to make it up. Ch. Prec. 27. Trin. 1691. Offley v. Offley.

See (I) Roll  
v. Roll.

(G) *Vested. In what Cases.*

Note; This bill was dismissed in 1685, and the dismissal affirmed in the House of Lords.—North K. distinguish'd between a

portion given by a will, or which is rather a legacy, and where it stands only upon a deed. That in the last case it is to be raised for the benefit of the administrator, but not in the case of a will, tho' it be devised payable out of land. Vern. 324. S. C. Puch. 1685.—S. C. cited. Arg. 2 Wms's Rep. 277.—Ch. Prec. 191. Fakh. 172. Brewin v. Brewin. S. P.—Ibid. 318. Mich. 1711.—A portion was given by will, to be raised out of the rents and profits of lands, and made payable at 21 or marriage; the daughter dies an infant, and unmarried. The portion shall not be raised. 2 Vern. 62. Per Master of Rolls. Smith v. Smith.—But if no time had been limited for payment, it had been otherwise. Ibid. cites Lord Rivers v. Lord Derby.—2 Vern. 72. Tr. 1688. S. C.—Thus lands settled on marriage charg'd to raise 10000 l. for daughters portions out of the rents and profits, and 100 l. per annum for maintenance for such as shall be living at the father's death, till the payment of the 10000 l. portions, but no time limited for the payment. The husband dies, and leaves A. his only daughter, who lives to 17, and by her will disposes of the 10000 l. It was decreed that this is an interest vested in the daughter, and well disposed of by the will.—S. C. cited Hill. 1697. 2 Vern. 352. in Case of THOMAS v. KRYMSON and says this decree was affirm'd in parliament.—Ch. Prec. 140. Hill. 1700. S. P. decreed per Lord Somers, assisted per Master of the Rolls, and afterwards per Lord Wright, and affirmed in Dom. Proc. Yate v. Festypiece.—S. C. 2 Vern. 416.—Lord Commissioner Jekyl cited S. C. and that it should sink for the benefit of a hæres factus, as well as of a hæres natus; for the former is substituted in the place of the latter, and the true reason is, that the legacy being given as a portion, when the child dies before the portion is payable, there is no occasion for it; and equity will not countenance the loading of an heir for the benefit of an administrator. 2 Wms's Rep. 277. Puch.

*Fatch. 1725. In Case of Jennings v. Looks. — So, tho' not mentioned to be given as a portion, if the fact appears to be so. Ibid.*

2. A. by will devised lands to be sold for payment of portions to his younger children. One of the children dies after the portion becomes payable, but before the land sold. Per North K. the administrator of the child that is dead is intitled to the money. Vern. 276. Mich. 1684. Bartholomew v. Meredith als. Moorehead.

3. A. by will charges his lands with 6000*l.* for the child his wife was privement enseint of, if it proved a daughter; with clause of re-entry for non-payment. A daughter is born, and died: this shall not go to the administrator. 2 Vern. 208. Hill. 1690. Norfolk v. Gifford.

4. By marriage settlement, lands were limited to the baron for life, remainder to the wife for life, remainder to first *&c.* sons, remainder to trustees for 500 years to raise after the commencement of the term 4000*l.* for younger children, payable at 21, or marriage, remainder to the heirs of the father of the baron. The baron died, leaving a daughter his only child, and his wife living. Tho' the Court held, that the money was not to be raised till the term should commence, yet his Lordship agreed that the words which ordered the payment at 21 or marriage should have their effect, viz. that they should vest a right in the daughter to this portion when she attained 21 (as she then had), and having attained that age, the portion, in case of her death, should go to her executors or administrators as a vested interest; per *Ld. Parker.* 10 Mod. 433. Trin. 1718. Butler v. Duncomb.

5. By marriage articles a term was created for raising 3000*L.* portion for a daughter in default of issue male, payable at 18 or marriage, to be raised by rents and profits, or by sale or mortgage, provided that if the father dies without leaving a daughter, or his wife enseint of a daughter, then the portion is not to be raised. The wife died, leaving a daughter her only child, now married. The *Ld. C. Macclesfield* taking notice of this proviso [which the book in stating the case says nothing of] said, that still there may be no daughter living at the father's death. So that there is a contingency still subsisting, which prevents the portion from becoming due. 2 Wms's Rep. 93. 100. Hill. 1722. Reresby v. Newland.

*And in the same case there was a proviso that the father with consent of the trustees might revoke all the uses, which his Lordship held to be still a subsisting power, and consequently*

suspends and prevents the portion from being as yet payable, because the father with consent of the trustees may yet revoke, and so he may at any time before the portion is paid: and to say that the right to this portion is vested in the daughter, is no objection; for if the term falls, as by such revocation it must do, all the trusts thereof must fall also, and consequently the trust for raising the portion. 2 Wms's Rep. 93. 101. Hill. 1722. Reresby v. Newland. — This decree was afterwards affirmed in the House of Lords. Ibid.

6. A term of 500 years was created by marriage settlement, to raise 5000*l.* for daughters payable at 21 or marriage, provided if any of the daughters should be 21, or married in the life of the father, then her portion to be paid at the end of one year after the father's death; and it was also provided, that if any of the said daughters

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daughters should die before her or their portions become payable, and before 21 or marriage, her or their share to go to the surviving daughters or daughter. There were issue one son and three daughters, C. D. and E.—C. married, and had a portion greater than her share of the 5000l. D. attained 21, married, and died in the father's life-time without issue. Her husband administered, and then the father died. It was insisted by the Solicitor General Talbot, that E. could not be intitled to D.'s share, because D. attained to 21, and was married; whereas to intitle E. the survivor, D. must have died under 21; or before marriage. And that D.'s share could not sink into the land, because such construction is to prefer the heir to the administrator of the deceased daughter, where such daughter died before 21, or marriage, so that a portion was not wanting to advance her, whereas in the present case D. was both married and 21. And of this opinion was the Ld. C. King, who observed, that equity had strained sometimes to help a daughter married in her father's life-time, but never to deprive a married daughter thereof. And that the last [first] proviso was without any negative words, that she should not be paid her portion till then; but the meaning was, that then in all events, even tho' the grandfather of such daughter, who had part of the estate comprised in the 500 years term limited to him for life, had been living, the reversion should have been sold notwithstanding, for raising this portion. And his Lordship decreed the third part of the 5000l. to the husband of D. with interest from the end of the year after the father's death, to be raised by sale of a third part of this term. 2 Wms's Rep. 513. Hill. 1728. Petfield's Case.

### (H) Merged by Conjunction of Estate.

She w<sup>thin</sup> age devised the portion. But the Master of the Rolls reliev'd against the merger, and decreed the portion to go according to the will of the daughter. 2 Vern. 90. Mich. 1688. *Powel v. Morgan*.

1. A Term raised for the portion of a daughter was extinguish'd by the inheritance descending on the daughter. 2 Vern. 208. Hill. 1690. cited in the Case of *NORFOLK v. GIFFORD*, as the Case of *Powel v. Morgan*.

S. C. cited G. Equ. R. 65, 66. Pasch. 7 Ann. Arg.

2. Marriage settlement of lands on A. for life, remainder to first &c. son in tail male, remainder to trustees for 500 years to raise 5000l. for daughters, payable at 18 or marriage, remainder to A. in fee. A. dies, leaving one daughter his heir at law, who lives beyond 18, and then dies unmarried. The Ld. Chancellor thought, that as the term in law was not merged, so neither was the trust determined or extinguished in equity, and shall go to defendant (who was the daughter's mother, and to whom the daughter by a will nuncupative mentioned that she devised all that was in her power to devise) who had administration with the

he will annexed. Affirmed in Dom. Proc. 2 Vern. 348. Hill. 1697. Thomas v. Keymish.

3. Whether a portion of 2000l. secured by a *term in trust* shall extinguish in the land by a *devise of the lands to the daughter in tail*? See 2 Vern. 457. Hill. 1703. Lawrence v. Blatchford. It was insisted it could not be extinguished, because nothing descended, or came to her in possession, only a reversion expectant on a 60 years term devised to trustees for payment of debts and legacies, remainder in tail to the daughter, who was heir at law. Whereas in the Case of THOMAS v. KEYMISH, the fee-simple in present possession was given to the daughter, and yet that was held no extinguishment. Ibid.

(I) Merged, or lapsed for the Benefit of the Heir. [ 447 ]

1. A. Made a *settlement to raise portions* of 4000l. for two daughters to be paid at the day of marriage or age, and reserved a power to order it otherwise by his will; and by his will made about the same time, he gives the same sum payable as directed by the said settlement. One dies, her portion shall not go to her administrator, but the heir shall take the profits, and a *difference* is taken between a *trust* and a *legacy*; for that a trust is expounded according to the intent of the party, and a legacy is govern'd by the rules of the common law. 2 Chan. Rep. 288. Pawlet v. Pawlet. Vern. 204. S. C. but no decree.— Afterwards the bill by the administrator was dismissed 1685. and the dismissal affirmed in Dom. Proc. in marg. ibid.

205. 321. S. C.—And North K. makes the difference between a *portion* by a settlement, and a *legacy*, and tho' here was both *deed and will*, yet the disposition was by the deed. Ibid.—If a settlement be made, and lands charged with such sums of money as a will shall declare, in such case the will will be but *declarative*, and not *operative*. Cited 2 Vent. 367. as decreed by Ld. North, in the Case of Bond v. Richardson.

2. A. a widower settles lands to raise 100l. a year for his eldest son, and 100l. a piece for his younger children; many of the younger children died in the life-time of their father; it was decreed that the administrators of the children so dead should have no benefit of this provision, but the same should cease. But in case any of the *daughters* had been *married in the life of the father*, and died; the husbands as administrators should have their portions. And Ld. Chancellor took a difference between a portion and provision, and a legacy payable at 21 &c. Vern. 335. Mich. 1685. Braithwaite v. Braithwaite.

3. A. seised of the manor of P. made a *mortgage to J. S. for 1000 years for securing 6000l.* and then settled the same on himself for life, and afterwards on B. his son in tail, remainder over, remainder to himself in fee, subject to the mortgage, and by will devised other lands for payment of his debts, provided that upon paying of the said mortgage, the same should be kept on foot to make good his daughter's portion, and thereby devised 3000l. to be paid to her at 21, or marriage, if she marry with consent of her mother and trustees, otherwise but a 1000l. and died, leaving a daughter E. who died at six years old. The question was, if the 3000l. was sunk for the benefit of the heir, or should go to the administrator of the daughter? Ld. Keeper Wright, assisted by the Master of the Rolls, dismissed the bill of the administrator S. C. 2 Vern. 416. but there it is stated that the devise for payment of debts and legacies was of some real estate and personal estate. And it was endeavoured to distinguish this from the Case

PAWLET. for having the portion raised, and this dismission was affirmed in the House of Lords. Chan. Prec. 140. pl. 122. Hill. 1700. Yate v. Fettiplace.

that was by deed, and this by will. 2d. Because there it was to be raised out of land only, whereas here the personal estate is liable as well as the land, and has been applied in part to pay off the mortgage that was on the land; but the Court held it to be within the reason of that Case.—2 Freem. Rep. 243. S. C. but states nothing of the devise being of personal estate, but rests it wholly upon other lands, and the keeping on foot the mortgaged term of 1000 years; and that it was held, that tho' the mortgage lease out of which it is to be raised be but a term for years, yet it is *not a term in gross, but a term attendant upon the inheritance after the debts paid*, and the trusts performed; but if it had been a term in gross, it had been a chattel and a personal estate, but it is not so here. And Ld. Keeper Wright said, it was a condition precedent, and all one as if he had said, If my daughter marry with consent of my wife, I give her 3000l.—S. C. 12 Mod. 276. Hill. 11 W. 3. 1698. but states it only (as to this point of its being merged) as charged upon land, and says, that it was decreed by Ld. Somers, and that he held, that in all cases where a man charges a *sum certain*, to be paid as here out of the *real estate*, there, if the person dies, the money shall be sunk for the benefit of the heir. But if a man devises a *personal legacy*, or a sum to be paid out of a *term for years*, and the legatee dies before the age &c. the executors or administrators of the legatee shall have the money; because it was *debitum in presenti*, tho' *solvendum in futuro*.—S. P. and Case cited Arg. 2 Wms's Rep. (610.) 611.) and per Ld. C. King (612.) and his Lordship said, that there is not the least difference between a sum of money charged by will on land payable to an infant at 21, and where such charge arises by deed. Trin. 1731. in Case of Duke of Chandos v. Talbot.

[ 448 ] 4. The reason why a legacy or portion charged on land shall sink into the estate for the benefit of the heir, where the party dies before it becomes payable, and not to do so when it is charged upon the personal estate, is *because the heir is more favoured at law and in equity than an executor or administrator*; and because the heir is looked upon to be the stay and support of the family, whereas an executor is sometimes a mere stranger to it; per Ld. K. Wright. 2 Freem. Rep. 244. Hill. 1700. in Case of Yate v. Fettiplace.

S. C. cited Arg. says, the 500l. was to be raised out of the rents and profits as soon as might be; so that whatever was raised before M. came to 21, was then to be separated from the land, and remain as money in the executor's hands, and consequently could never merge for the benefit of the heir when once separated from the land. And tho' (as it appear'd from the decreal order, which was produced in Court) debts came in so fast that the 500l. could not be raised: so soon as expected, yet the intent was the same, that it should be raised for her; and that it was decreed probably upon that or some other circumstance not mentioned in the book. Cases in Chan. in Ld. Talbot's time 110. And Ibid. 122. Ld. Chancellor cited S. C. and said, that the marriage of the daughter might be the cause of that decree, the 500l. being intended as a portion, altho' no express provision was made that it should be paid upon the daughter's marriage. Trin. 1735. in Case of the King v. Withers.

Chan. Prec. 195. S. C.—2 Freem. Rep. 254. 6. By marriage settlement a term was to commence after the decease of the survivor, to raise 3000l. in 12 months for daughters portions. There being only one daughter, the father by will de-

wifes

*wifes the trust lands to make good the wife's jointure, and to raise 3000*l.* for his daughter's portion; this being a portion to be raised out of the land, it shall not be raised for the administrator of the daughter, who died at five years old, before she had occasion of a portion, but shall merge in the land for the benefit of the heir.* 2 Vern. 439. Pasch. 1702. Bruen v. Bruen.

S. C.—Abr. Equ. Cases 267. (D). pl. 2. S. C. and adds a note, The daughter died within the 12

months, tho' it does not appear in 2 Vern. 439. —[Neither do I observe in the S. P. mentioned, either in Chan. Prec. or 2 Freem. Rep.]—S. C. cited by Ld. Chancellor Talbot, and also the Case of *TOURNEY v. TOURNEY*, who said, that indeed in such cases, where the *child dies so young, that the portion could never be wanted*, the Court will not decree it to be raised, because there is no occasion for it; but said, that there is *no precedent where the Court has dealt so hardly with a child who died after marriage*, as to take away that which was intended for its provision. Cases in Chan. in Ld. Talbot's time 123. in Case of *King v. Withers*.

7. Upon a marriage settlement, a term was raised for providing portions for younger children, *to be paid \* at such time as the trustees should appoint in their discretion for their better support and maintenance.* One of the younger children was put to a sea captain, and died at 17, the trustees having made no appointment for payment of his portion. The Master of the Rolls decreed that what had not been raised of his portion for putting him out and for maintenance should sink into the inheritance. Ch. Prec. 213. Hill. 1702. Warr v. Warr.

\* To be paid in a year's time after the father's death, with interest at 5*l.* per cent. from his death till paid. There were three children; one died

*within a year after the father's death*; per Ld. Cowper. The portion, tho' raisable presently, was not demandable presently, and therefore shall sink into the inheritance for the benefit of the heir. Ch. Prec. 290. Hill. 1709. *Tournay v. Tournay*.

8. Where a child's portion is to be raised out of a trust estate, created by a voluntary family settlement with a power of revocation, and the child dies unmarried and intestate before his father, equity will never raise the portion, but it must sink in the estate. MSS. Tab. tit. Portions, cites 1702. Warburton v. Warburton.

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9. Where portions are provided for daughters by a settlement, the father cannot by his will annex any condition to the payment of them, or devise them over in case of the death of any of them before their portions become payable, for he had only the power of appointing, and in case of death of either, the portion would *extinguish in the land* for the benefit of the heir. 2 Vern. 452. Mich. 1703. Alston v. Alston.

10. A term is limited after the death of father and mother, to raise portions for daughters if no sons, *payable at 18 or marriage, provided such daughters survive their father*; if either die in the life-time of their father, her portion is not to be raised. 2 Vern. 655. Trin. 1710. Hickman v. Anderson.

The trust of a term was declared that if A. the husband should die without bene-  
mal: by M.

*and leaving a daughter &c. then such daughter to have 3000*l.* at 21 or marriage; and if A. should not have any daughter by M. living at his death, then the term to cease.* A. and M. had issue E. a daughter who at 21 and married the plaintiff. M. died, leaving no issue but E. and afterwards E. died leaving A. having issue by the plaintiff. Then A. died, and the plaintiff as administrator to E. brought a bill for the portion. But Ld. C. Cowper held him not intitled, for the term never arose, it being to commence on a condition precedent, v. z. If A. should die without heir male leaving a daughter, which he did not, and cannot be intended of having had a daughter: and that the proviso determines the term itself, by not having a daughter living at his death; and if it be determined at law by the express provision of the parties, he said it would be strange for Chancery to

revive

revive it, and that perhaps the intention might be that in such case it should not be raised. *Wm. & Rep. 401. Hill. 1717. Wingrave v. Palgrave.*

11. *Part of lands charged with 400l. portion are devised to the party to whom the portion is payable; although the lands devised are worth more than the portion, yet it is no extinguishment of the charge. MS. Tab. tit. Portions, cites Feb. 28. 1725. Ruffout v. Ruffout.*

12. A. the testator being possessed of a considerable real and personal estate, devised it thus, viz. *I give and bequeath unto my daughter M. at her age of 21, or day of marriage, which shall first happen, the sum of 2500l. And my will and meaning is, That if my son C. should die without issue male of his body then living, or which may afterwards be born, that then my said daughter should have and receive, at her age of 21, or day of marriage, which shall first happen, the further sum of 3500l. over and above the said sum of 2500l.; but in case the contingency of my said son's dying may not happen before the said age of my daughter, or her day of marriage, that then she shall receive and be paid the sum of 3500l. whenever it might after happen.* Then he devises his real estate to his son in tail, and for want of such issue, remainder to his brother in fee; then goes on thus: *And my will and meaning is, that the lands and premises hereby devised shall be liable to, and chargeable with the payment of the said sum of 3500l. whenever it shall become due and payable; and directs, that in case of failure of issue of his son, his daughter, her heirs, or assigns, should join in a surrender of some copyhold lands to the use of his brother, otherwise the legacy of 3500l. to be void.* The daughter marries, having attained her age of 21, and dies in her brother's life-time, leaving the plaintiff her husband, who took out administration to her, and then her brother dies without issue male. The question was, whether the legacy of 3500l. should be raised out of the land, the personal estate being deficient? and whether it was such an interest in her as should go to the plaintiff her administrator? *Ld. C. Talbot* observed, that three things were, by the will, necessary to happen to intitle M. to this legacy of 3500l. viz. the death of C. without issue male, marriage, or attaining her age of 21; and that all three had happened; and though it is to be raised out of land, it remains money still; and though she has not lived to receive it, yet the contingency having happened, it must go to her husband, who is her representative, and who may well be thought to have married in contemplation of this additional [ 450 ] fortune of 3500l. though depending upon a contingency; and decreed it to the husband accordingly. And, 16 March 1735, the decree was affirmed in the House of Lords. Cases in Chan. in *Ld. Talbot's* time. 117. Trin. 1735. *King v. Withers.*

13. Mr. Baynton being seised in fee of a considerable estate, and having no children, by indenture January 19, 1715, covenanted to suffer a recovery of all his lands, to the use of himself for life, then to his wife for life, then to the issue of their bodies; and for want of such issue, in trust for his sister Anne Rolt, for

for her sole and separate use during life ; and *after her death*, if Edward Rolt her husband should survive her, to permit him to receive the clear yearly sum of 1000*l.* during life, and afterwards to Edward Rolt (eldest son of Edward and Anne) *for life*, with remainder to his first and other sons, with like remainder to Thomas, and all the other sons of Edward and Anne. Then comes this proviso : *Provided also, that it shall and may be lawful to and for the said Anne Rolt, with the consent of the said Edward Rolt her husband, and for the said Edward Rolt, her surviving, from time to time, by sale, mortgage, or otherwise charging the premises, to raise and secure such sums of money not exceeding in the whole the sum of 12000*l.* as the said Anne, notwithstanding her coverture, shall with the consent in writing of her said husband, think fit, and for the said Edward Rolt her surviving, as he shall think fit, for the maintenance and portion of any of the children of them the said Edward and Anne, born or to be born ; and if the said Edward and Anne his wife, or the survivor of them, shall not appoint in what proportion such their children shall be provided for, then all the parties to these presents are agreed that 2000*l.* a-piece shall be raised and payable to each such younger sons, and 3000*l.* a-piece for the daughters of the said Edward and Anne, and if there shall be but one daughter, then 6000*l.* for such only daughter, at their ages of 21 years with interest for the said several sums after the rate of 5*l.* per cent. for their several and respective maintenances, until their respective portions shall become payable ; and such maintenance to begin from the time that shall be appointed by the said Edward and Anne his wife, or the survivor of them ; and in case no such appointment, then from the death of the survivor of them the said Edward and Anne his wife ; then comes a provision, that if any of the younger children die before their respective shares become payable, then the share of such child so dying shall be equally divided amongst the surviving children. Mr. Baynton died soon after without issue, and then, in the year 1722, Mr. Rolt died, leaving issue by his wife four younger sons, and two daughters, Elizabeth, and Anna Maria, which last died an infant soon after her father's death ; and in the year 1734 the mother died, having never charged the lands with the 12000*l.* or any other sum for the children's provision, nor giving any direction in what manner or proportion they should be provided for, some of the children having attained their age of 21 in her life-time. Ld. C. Talbot held, that tho' by the first clause 12000*l.* only was to be raised, yet that the second clause is subsidiary to the first ; and that in case the first does not take effect, then the second was to prevail, whereby he made a certain direct charge of 3000*l.* for each daughter, and 2000*l.* for each younger son, without any provision (as there was in the first clause) that the whole should not amount to more than 12000*l.* That by the first clause such children only can be considered as intitled to any share under the power of appointment as were living at the survivor's death ; but no appointment having been made, it stands upon the second*

cond clause, which is a direct charge upon the land of 2000*l.* for each son, and 3000*l.* for each daughter; and his Lordship was also of opinion, that tho' the payments were to be at 21, yet *no certain interest vested in any of the children until the survivor's death*; and tho' some of them attained their ages of 21 in their mother's life-time, yet all being contingent until the survivor's death, *no interest can be due but from the time of the happening of the contingency*; and so decreed the whole 14000*l.* to be raised, and interest from the mother's death only. Cases in Chan. in *Ld. Talbot's* time. 189. *Hill. 1735. Rolt v. Rolt.*

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14. The rule of portions sinking in the land where the party dies before the term out of which they are to arise comes into possession, has not always held without exception, as appears from *BUTLER* and *DUNCOMB'S* Case. 2 Vern. 760. where the words were from and after the commencement of the term, and therefore the portion not payable during the life of the father and mother, the term not being yet commenced; but yet the Court enabled the husband and wife to raise money upon the interest by way of mortgage; which was to consider it in some sort as already vested; so in that of *BROOME v. BERKELY*, *Abr. Equ. Cases* 340. notwithstanding the portions were decreed not to be raised immediately, yet they were considered as transmissible interests; the same in *KING AND WITHERS'S* in the House of Peers. In all these cases the limitation was, that the portions should be paid them at such a time, as upon marriage, or at such an age; and the intent of the parties was plain, that upon either of these contingencies happening, the child should be intitled to the portion, although it was contingent, since a contingent interest is transmissible; and a future provision may well be looked upon as a consideration for marriage; per *Ld. C. Talbot*. Cases in Chan. in *Ld. Talbot's* time, 194, 195. *Pasch. 1736.* in Case of *Bradley v. Powell.*

15. A. was tenant for life, remainder in tail to B. the eldest son. They resettled the estate to the use of A. for life as to part, then to trustees for 200 years to raise 1100*l.* to be paid to C. the second son within six years after A.'s death, or as soon after as the same could be raised, and in the mean time interest from A.'s death for and towards his maintenance until the portion be paid him, remainder to B. the eldest, &c. C. died indebted at 45 years of age, leaving no assets; and two years after him A. died, from whom an estate of 700*l.* a year came to B. *Ld. C. Talbot* thought this 1100*l.* must be considered as a portion, as it moved from the father, and was intended by him as a provision for his child; the term and trust are not to arise until the father's death, but no particular time is limited for payment of the 1100*l.* but barely within 6 years after A.'s death, and not made payable to him, his executors, and administrators &c. but barely to him, with a provision, that from A.'s death 5*l.* per cent. shall be raised for and towards his maintenance, which looks like an intent to postpone the vesting till A.'s death, since the 5*l.* per cent. for and towards his maintenance can never be raised to that purpose when he died in A.'s life-time.

time; for this necessarily supposes him living at A.'s death, and where the interest is contingent, as here it is, it is most reasonable to consider the principal as contingent likewise; and should the construction be otherwise, the term can never cease, it being to endure for and towards his maintenance until the portion be paid, which it can never be since he died in A.'s life-time; and thought the whole contingent, principal as well as interest, and that the portion must merge; and so dismissed the bill. Cases in Chan. in Ld. Talbot's time. 193. Pasch. 9 Geo. 2. Bradley v. Powell.

16. Where land is charged for payment of portions, and the legatee dies before the time of payment, it is true in general that the legacy shall not be raised, but sink for the benefit of the estate; but where portions are directed by the will (as in the principal case it was,) to be raised and paid within two years after the testator's death, and a daughter survives these two years and then dies, it is otherwise. By Mr. Justice Parker, who sat for the Lord Chancellor. Barn. Chan. Rep. 89. Pasch. 1740. Webb v. Webb.

(K) Lapsed. In respect of the Settlement not being [ 452 ] made.

1. A. On the marriage of E. his daughter in law with J. S. entered into articles, in which it was recited, That *whereas A. was to pay J. S. 1000l. for the marriage portion of E. his wife. J. S. covenanted to settle certain lands &c.* It fell out, that the share of the personal estate (out of which the 1000l. was supposed to arise, and of which A. was possessed as being the estate of his wife's former husband, and out of which his wife and E. her daughter were both intitled to their distributive shares) amounted only to 320l. for E.'s share. Upon a bill by J. S. for payment of the 1000l. it was decreed accordingly, tho' it was objected that *E. lived but six months, and that J. S. was not able to have made the settlement agreed upon, and that she had very hard usage from J. S. the time she lived with him.* 2 Freem. Rep. 57. Trin. 1680. Graves v. White.

The marriage portion was agreed to be paid to such person as he should appoint in the space of six months, and be in consideration thereof was to settle certain lands; the marriage was had; the wife died, and the six months

elapsed, and no person appointed to receive the money, yet the portion was decreed to the husband without examining his capacity to make a settlement according to the agreement; cited by the Ld. Chancellor. 2 Freem. Rep. 58. pl. 64. Trin. 1680. as then lately decreed in Ld. Delaware's Case.

2. A. intermarried with M. without her father's consent; afterwards the fathers of A. and M. entered into articles, by which *M.'s father agreed to pay 1000l. into trustees hands, to be laid out in lands to be settled on A. for life, and then to M. for life, with remainder to the issue of their two bodies.* Before this agreement was executed M. died without issue; the Court decreed payment of the 1000l. to A. it being M.'s portion, and it appearing that a settlement was made upon A. by his father in pursuance

*fuance of the said articles.* 2 Freem. Rep. 200. Trin. 1694.  
Harvey v. Chamberlaine.

## (L) Favour'd.

Sid. 102.  
S. C.

1. A Settlement was made in consideration of marriage and 1000l. to the use of *baron for life*, remainder to the *son* in the usual manner *in tail*, and *if he die without issue male* then to the use of the *daughters for 500 years to raise 1500l. for their portions*. The baron died, and *leaves a son and a daughter*, and after *the son dies without issue*. The daughter brought ejectment, and judgment was given for her, notwithstanding it was insisted, that this term was on a condition precedent which did not happen, and also that the term was void in its creation. And held that this was such a dying without issue male within the intent of the settlement as that the term shall arise. Lev. 35. Goodin v. Clerk.

*As A. made a lease on the marriage of B. his son with M. for provision of*

2. Where a deed is for provision of daughters portions, and the deed is *uncertainly worded*, construction shall be made upon the whole deed to make the intent appear that the daughters shall be provided for in some case.

*portions for daughters of the marriage, to commence on death of B. without issue male, or from the time that B. shall be dead before the daughter or daughters shall respectively attain to 16 years of age without issue male of his body by M. which shall first happen, he leaving a daughter or daughters by M. or the being enitent of a daughter, for 200 years thence next ensuing; B. had issue C. a son, and J. a daughter, at which time J. was under 16; afterwards C. died, J. being upwards of 16. The Court seemed to think that the lease should arise upon the first words (viz.) on death of B. without issue male, though it is not within the last part of the disjunctive.* 3 Lev. 99.  
[ 453 ] Pasch. 35 Car. 2. C. B. Watts v. Guybon.

*As where A. farrenders copyhold lands to B. his brother,*

3. And may be carried beyond the words of the deed, in case where the whole residue of estate real and personal was given away to a brother.

*and J. S. to the use of his brother B. and his heirs, on condition to pay to M. the only child of A. when she comes to the age of 21, 200l. provided if his daughter died without heirs of her body, then B. the brother to have the 200l. A. died, M. being but two years old; M. at 18 marry'd the plaintiff, had issue, and died at 20 years and an half; the issue died an infant; decreed for the plaintiff.* 2 Chan. Cases 94. Pasch. 34 Car. 2. Row v. Tillier.

4. Money placed out upon bonds by a father in the name of a child shall be look'd upon to be toward a provision for such child. MS. Tab. tit. Portions, cites February 14th, 1706. Parker v. Lamb.

5. Lands by marriage settlement are limited to the sons in tail male, remainder to A. the husband in fee, provided if A. and his wife, or either of them die without issue male living at the time of his or her death, leaving only one daughter unmarried, the trustees to stand seised till they have raised 1500l. for such daughter, and if more daughters unmarried at the death of A. and his wife, or either of them, and no issue male living begotten between them, then 3000l. for such daughters. *A. dies leaving daughters,*

daughters, and his wife *enfeint* of a son which is afterwards born. Question was, whether upon the wording of this proviso, the posthumous son should defeat the daughters of their portions? It was agreed, that there being no provision for the posthumous son, and the father dying before the son born, *the son could not take by the settlement*; for the remainder must immediately vest when the particular estate determined. And it was insisted, that as the proviso was worded, a construction could not be made, that the daughters were to have portions upon failure of issue male, and whilst issue male no portions to arise; for that the proviso is special and operates both ways, viz. If a son living at the decease of A. or, his wife first dying; tho' there should afterwards be a failure of issue male, no portions could arise to the daughters. So e converso, if no son living at the decease of A. or his wife, the portions should arise, although a son should be after born. Per Ld. Keeper, Generally and most commonly it is the intent of the parties, that the daughters are not to have portions provided by the settlement if there be a son. So when no provision is made for a posthumous son, although it is the intent of the parties that the son should have it, yet *until the late \* statute such posthumous son could not take*; so that what might be the intent of the parties cannot be the rule. And if in this case *the daughters* (upon the wording of the settlement, and as it were by accident not being directly intended by the parties) *become intituled to a reasonable provision and portion, he thought equity would not take it away*; but would be further informed as to the value of the estate, and whether the other daughters had received their portions. 2 Vern. 578. Hill. 1706. Palmer v. Cracroft & al.

\* 10 & 11  
W. 3. 16.

6. A. seised of lands in fee conveyed to J. S. and his heirs, to the use of *himself and to his wife R. for life, remainder the 1st, 2d, 3d, 4th, 5th, &c. sons in tail*; and for default of such issue, and *in case the said A. should die, or be dead without issue male of his body of the said R. to be born, or in ventre sa mere at the time of his death, and shall leave one or more daughters of his body on the body of the said R. begotten or in ventre sa mere at the time, then to the use and behoof of the said J. S. and his executors for 500 years, to raise portions for his said daughters*. The husband dies, leaving issue male and daughters at the time of his death, which issue male soon after died without issue male, leaving the daughters; the wife dies; the question was, if this term should rise up again for the benefit of the daughters? The opinion and judgment of the Court was, that it should not, it being a *condition precedent*, and not a remainder upon the determination of the estate tail. This judgment was reversed in the House of Lords, upon the reasoning that Mr. Raymond urged, viz. that the time of his death related only to the *ventre sa mere*; and then it was no more than an usual limitation; for the wife was not *enfeint*. Vid. 11 Mod. 88. and Hol's Rep. 623, 624. Andrews v. Stroud.

[ 454 ]

7. Father upon his son's marriage settles lands, which he cove-  
nants

wants to be 800*l.* per ann. and reserved power to himself to charge 1200*l.* for his younger children. He charges the estate with 600*l.* only and dies. The son objected to the payment of 600*l.* because the value of the lands was defective, being only 600*l.* [a year,] which ought to be made 800*l.* [a year] before the charge should take effect. But decreed that the money was well charged, the father having only charged a moiety of the 1200*l.* and in case there were a deficiency he ought to sue for satisfaction out of his father's estate for the breach of covenant. MS. Tab. tit. Power. Jan. \* 12th, 1712. Ormsbey v. Dodwell.

\* In another MS. it is soth. 1702.

8. *What is expressly paid towards a portion shall be first applied to discharge the interest of such portions.* MS. Tab. tit. Portions. February 17th, 1724. Lord Kingsland v. Lady Tyrconnel.

[For more of Portions, see Charge, Debit, Marriage, Pottery, and other proper Titles.]

## Possession.

### (A) *Who shall be said in Possession of Land, or Things Real.*

He cannot be disseised of a rent service in gross, rent-charge, or rent-sec by attornment or payment of the rent to a stranger, but at his election; but if the disseisee bring an assise against a pignor, then he admits himself out of possession. Co. Litt. 323. b. — No one who has right to such things as are *invisible and incorporeal*, as rents &c. can be put out of possession thereof, but only at his own election by a *fiction of law*, in order to enable him to recover damages against the wrongful disturber; for such things being *mere creatures of the law*, and depending entirely upon the construction thereof, are always in possession of those whom the law adjudges to have a right to such possession. Hawk. Pl. C. 151. cap. 64. f. 45.

1. **O**F rent and common a man is in possession and out at his will upon disturbance made, be it appendant or in gross; and seisin of parcel of the rent is good to have assise of the whole rent. Br. Assise, pl. 131. cites 8 Aff. 4.

Br. Seisin, pl. 24. cites S. C. per Knivet. — See Descend.

2. If *bastard and mulier* enter after the death of the ancestor, the possession shall be adjudged in the mulier. Br. Entre-Cong. pl. 67. cites 30 Aff. 51.

3. If one be seised of lands, and another who has no right does enter into the land and continues possession, yet does he gain nothing

nothing thereby, but the possession does always *continue in him that has the right*. Bridgm. 57. cites Litt. Warranty 158. and 3 E. 4. 2. and Pl. Com. 233.—Unless where there is an actual disseisin. Sec. Mo. 694. Partridge v. Turk.

4. When *two men come upon lands and tenements together to claim the said lands and tenements, and one of them claimeth by one title and the other by another title*, the law does adjudge the possession in him who has rightful title to the possession. Perk. f. 218. For if a disseisor dies seized of the same land in fee, and the heir of the disseisor

*and the disseisee come upon the same land together to claim the same land, the law will adjudge the possession of the land in the heir of the disseisor, and not in the disseisee;* [ 455 ] *yet the disseisee habet majus jus ad rem, viz. in jure to have the land, than the heir of the disseisor has; but the heir of the disseisor has majus jus in re, viz. in possessione to have the land than the disseisee has.* Perk. f. 218.

5. Possession is *supposed to continue* if it be not avoided. Arg. Hard. 46. in Case of Jones v. Clerk.—Cites Pl. C. 193.

6. When a man *may enter or claim*, the law adjudges him not in possession *till entry or claim*. Co. Litt. 218. a.—1 Rep. 94. b. (g.) in Shelly's Case.—2 Rep. 53. b. (c.) in Chomley's Case.

7. By bargain and sale for money for 3 years the *bargaineer before entry* has estate for years divided from the reversion, and a reversion in the vendor. Jo. 9. Mich. 18 Jac. C. B. Mitton v. Lutwich.

8. *Patronage* by grant for years is in the grantee, but by grant of 1, 2, or 3 avoidances, the patronage is not severed, but is still in the grantor; per Jones J. Arg. Jo. 19. Hill. 20 Jac. C. B. in Case of Standen v. the University of Oxon.

9. After a *judgment of recovery*, the law judges not *tenant for years* in possession of these lands till he has *claimed* them; per Archer J. Arg. Cart. 59. Pasch. 18 Car. 2. in Case of Geary v. Bearcroft.

10. If a man bargains and sells lands, presently the *bargaineer* has actual possession. He may surrender, assign, attorn, release; yet he cannot on this possession *bring trespass*, and so he has no actual possession; per Bridgman Ch. J. Arg. Cart. 66. Pasch. 18 Car. 2.

11. *Tenant at will and he in reversion* are in possession of a house, he in reversion is *housekeeper*, yet the possession shall be adjudged to be in tenant at will. Sid. 385. Mich. 20 Car. 2. B. R. Kinnoul v. Whitcot.

12. A *bare entry* on another *without an expulsion*, makes such a seisin only that the law will adjudge him in possession that has the right, and so are the words *intravit & fuit inde seisit. prout lex postulat*, to be understood in special verdicts, but it will not work a disseisin or abatement without actual expulsion. 1 Salk. 246. per Holt Ch. J. Trin. 3 Annæ B. R. Anon.

(B) *Who shall be said in Possession of Goods.*

1. **O**F a heriot which is *transitory*, the law adjudges *possession without seisure*; as of the body of a ward. Br. Hariots, pl. 9. cites 13 E. 3. and Fitzh. Prescription 29.

S. C. cited  
11 Mod. 12.  
in Case of  
Cowper v.  
Basingstoke  
Hundred.

2. If a *highwayman* come up to a carrier and *lead the horse out of one hundred into another*, this is a robbery in the first hundred; for the carrier was robbed upon the first taking. But if the *carrier had led the horse himself*, then it should be adjudged to be in his own possession, and no robbery till he came into the second hundred. And if a man has money, and the malefactors take him in one hundred, and carry him into another, and there rifle him, this is a robbery in the second hundred only; for he is always in possession. Per tot. Cur. and adjudged accordingly. Goldsb. 86. pl. 11. Pasch. 30 Eliz. Anon.

3. A man's *pocket was picked* in the King's Bench, and the thief was taken in the manner, but a *key fastened to the purse stuck in the pocket*, and two Justices against two, that the man was still in possession of his purse, and so no robbery. Goldsb. 86. pl. 11. Anon.

4. In case of *bailment* the proprietor is to some purposes in possession, and to some purposes out of possession. Vent. 261. in Case of Batmore v. Greeves.

[ 456 ] (C) *Of One. In what Cases it shall be of Another.*

1. **T**HE possession of one executor is the possession of the other. Arg. 3 Le. 209. cites 16 H. 7. 4.

2. The possession of the *termor* in the same tenancy is the possession of the *recoveror*. Br. Assise, pl. 1. cites 27 H. 8. 7.

3. A. has *custodiam parci*, and the inheritance is granted to B. The possession of A. is the possession of B. and if A. refuse B.'s entrance, he may break the doors and justify. Mo. 786. Mich. 4 Jac. Lady Russell v. Lord Nottingham.

S. P. Yelv.  
—165.  
Mich. 7  
Jac. Free-

4. Possession of the *lessee* is the possession of the *lessor*. 2 Brownl. 298. Hill. 7 Jac. C. B. Mors v. Webb.

iston v. Shellito.—Tho' the possession of the *lessee* is the possession of the lessor by operation of law, yet to make an occupant there must be *actual possession*, and not a possession by inference, discourse or argument in law, but such an occupation as the lay gents may take notice of. Per Archer J. Cart. 58. Pasch. 18 Car. 2. in Case of Geary v. Bearcroft, cites Raft. Ent. 69. that in an action of waste, the question was, whether such an one did occupy the lands; and the pleading it, that he did occupy the lands and take the profits, and so there they are synonymous. And after judgement was given accordingly by three J. against Bridgman Ch. J. and that judgment affirm'd per three J. in B. R.—2 Lev. 202. S. C.—Sid. 346.

See Rob-  
bery.

5. The possession of the *servant* in the master's presence is the possession of the *master*. Carth. 147. Bird v. the Hundred of Osulfston.—Cited there in Case of Ashcomb v. the Hundred of Elthorn.—

Elthorn.—3 Mod. 287. S. P. in Case of Ashcomb v. Elthorn.—D. 161. Lord North's Case.—3 Mod. 323.—Ow. 131. Hall v. Wood.

6. *Devise was of knight-service-land to wife for life, which was void for a third part, and it was enjoyed between her and the heir during her life. The possession was held joint, and that the possession of one was the possession of the other; and that tho' tenants in common have several freeholds, and joint-tenants but one, yet it is to be understood that tenants in common have several freeholds, but undivided, and joint-tenants have one undivided freehold. Per Holt. Ch. J. 12 Mod. 302. Mich. 11 W. 3. in Case of Fisher v. Wiggs, cites Mo. 868. Small v. Dec.*

7. Possession of one joint-tenant is the possession of the other. 6 Mod. 44. Mich. 2 Annæ B. R. Ford v. Lord Grey.

The entry of one vests the possession in both.

Le. 147. Hed v. Challoner.—Per Manwood J. 264. pl. 354. Anon.—So the possession of an indenture of lease by one jointenant, is the possession of both; and the proving the delivery of it to the one is good evidence of the possession of it by the other. 2 Le. 220. Anon.

8. The possession of a trustee is the possession of *cesty que trust*. G. Equ. 235. temp. Geo. 1. Wan v. Lake.

And the possession of one *cesty que trust* is the

possession of all; as the possession of one tenant in common is the possession of the rest. G. Equ. R. 235.

\* See Gift—Presentment (R. b.) pl. 1. (T. b.) pl. 1. † See Presentment (K. b.)

(D) *What will \* give or make a Possession. And what will put a Man † out of Possession.*

1. *OF a thing transitory, a man shall be in possession without entry or \* seizure. Br. Trespass, pl. 169. cites 14 H. 8. 23.*

As where tenant in chivalry died his heir

within age, the Lord should have *ravishment of ward without seizure*, but not *ejectment* of ward of the land. Br. Trespass, pl. 169. cites 14 H. 8. 23.—\* S. P. Br. Chattels, pl. 21. cites 2 H. 4. 19.

2. If the King be intitled by office to the land to which N. hath title and right, he cannot enter upon the King; for by office the King is in possession, and N. is out of possession, and if the King grants it over, he cannot enter upon the patentee, the office being in force; but he who hath a *rent-charge* or *common* extra terram illam is not out of possession, but may distrain the patentee, or use his common. Br. Entre-Cong. pl. 42. cites 21 H. 7. 1. [ 457 ]

3. If lessee for years makes a lease at will, and lessee at will makes a lease for years, and then he in remainder grants over his land, this is good, tho' the deed of the grant of the interest be not made upon the land; because he is not out of possession, but at his election. Agreed. Lat. 75. in Sir Thomas Fisher's Case,

(E) *Favour'd, By Accession of Right.*

1. *THE right waits upon the possession.* As if the son and a stranger disseises the father and the father dies, this right infuses itself into the possession, and changes the possession; and it is a release in fact by the father to the son. Arg. Godb. 310. cites 11 H. 7. 12.

2. So a disseisor dies seised, and his heir enters and is disseised by A. and the first disseisee releases to A. all his right; all the right now is in A. the second disseisor; because the possession and the right meet together in A. Arg. Godb. 310. cites 9 H. 7. 25. Br. Droit. 57.

3. Per stat. 21 Jac. 16. *peaceable possession for twenty years tolls entry*, and after such possession release of actions gives right, and there is no remedy for the fee by writ of right after such possession and release of actions. Jenk. 16. pl. 28.

(F) *Privileges of Possession.*

1. *Possession prevents election*; as if A. sells 1000 cord of wood to B. to be taken at B.'s election, and then A. or any body else cuts down some of the wood, B. cannot take that which is cut down; but must make his grant good out of the residue: so of *estovers* granted; and if no wood is left for his estovers, B. has no remedy but an action fur case. Cro. E. 820. Pasch. 43 Eliz. B. R. Basset v. Maynard.—als. Sir Thomas Palmer's Case.

2. *Bushes cut in a common by a stranger cannot be carried away* by a commoner, where the commoner claims common of estovers only: but if he prescribes to have *omnes spinas crescentes*, he may then carry them away; and in such case the licence of the lord is not material; for he cannot cut any himself. Cro. J. 256. Mich. 8 Jac. B. R. Dowglass v. Kendall.

When no title is found for the defendant, and it is found that

3. He that has possession has *right* against all but him that has the very right. Chan. Cases 25. Trin. 15 Car. 2. Smith v. Oxenden.

he ousted one that had elder possession, his entry is *tortious*; per Clench J. Goldb. 178.

Carth. 9. S. C. is that defendant pleading that W. S.

4. Where the interest of the land is not in question, a man may *justify in trespass* upon his own possession. 3 Mod. 132. Trin. 3 Jac. 2. B. R. Lanford v. Webber.

*possessorius fuit*, without shewing any title, was not good; but such plea was adjudged good on a demurrer, without shewing any other title than possession, and the copy of the record produced in Court, cites 2 Mod. 70. Searle v. Binion.—But in trespass by one seised in fee-possession is no justification without *shewing how*. 2 Saund. 401. Pearle v. Bridges.

[ 458 ]

5. In many cases, where a man has the possession, tho' he has *no property* in the goods, he may have trespass. Carth. 85. Mich. 1 W. & M. B. R. cites 4 Rep. Lutterel's Case.

But not trover; for in trespass there are many pleas

which will serve, as his freehold &c. which will not in trover and conversion. Per Doderidge J. and judgment accordingly. 2 Bull. 134. Holman v. Carwithy.

(G) *Sufficient for what Purposes, as to Actions.*

See Trespass (S.)

1. *Ravishment of ward*; and counted of tenure and chivalry, and that the plaintiff seized the ward, and the defendant ravish'd him; the defendant said that he held of him in chivalry, by which he seized him, *absque hoc* that the plaintiff seized him, or that he held of the plaintiff prout &c. And held that the *seisin* of the ward is not traversable; the reason seems to be, because a man shall have this action without *seisin* of the ward; for the law adjudges possession, because it is transitory &c. and therefore he omitted his traverse, and they were at issue upon the other traverse; quod nota bene. Br. Traverse per &c. 120. cites 24 E. 3. 78.

2. A man may have *replevin* who has not property; per Briggs. Br. Traverse per &c. pl. 263. cites 21 E. 4. 54.

A possessory right is sufficient to maintain an

action of trespass, tho' not a replevin. 10 Mod. 25. Trin. 10 Ann. B. R. in Case of Templeman v. Case.—The reason why it is not good in *avowry*, is because it comprehends a title in itself. Arg. 12 Mod. 507.

3. Property draws with it the actual possession of goods whereupon to have trespass. Lat. 214. in Case of Hudson v. Hudson.

S. P. Br. Trespass, pl. 303. cites 2 E. 4. 25. per Littleton; quod Danby concessit; for

4. As if a man in London gives to me his goods in York; if another takes them I shall have trespass. Lat. 214. in Case of Hudson v. Hudson.

he has property by the gift. And this seems to be law; for goods are transitory; contrary of land, which is local.—Br. Trespass, pl. 169. cites 14 H. 8. 23.

5. In trespass, defendant justified by distress for rent and services. The plaintiff replied *hors de son fee*. Defendant demurred; because he said, such plea is not pleadable without taking the tenancy upon him, and cited Co. Litt. 1. b. But it was answered, that this is meant in cases of assise and replevin where the title is in question; but this being but an action of trespass, the possession is sufficient to maintain the action against any that has not a better title. And judgment for the plaintiff. Nisi. Freem. Rep. 221. pl. 228. (bis) Hill. 1676. Anon.

6. Possession is sufficient cause to maintain action against a tort-feasor and a declaration upon the possession is good. Carth. 84. Mich. 1 W. & M. B. R. Hebblethwait v. Palms.—3 Mod. 48. S. C.—Cro. C. 575. Sands v. Trefuses.—6 Mod. 312. Tenant v. Goldwin.

7. Institution and induction upon a presentment without a title, gives

gives the party such a possessory right, as he shall not lose without a qua. impedit. Arg. 10 Mod. 174. Trin. 12 Annæ. B. R. The Queen v. the Corporation of Buckingham.

8. In case of an *ejectment*, unless the *person turned out*, tho' by one that has no right, can *prove his right*, he shall not recover tho' this is a possessory action. Arg. 10 Mod. 177.

## [ 459 ] (H) Sufficient, as to other Purposes than Actions.

1. *Possession executed, hinders possession executory.* As if bargain and sale be of land, and before inrolment bargainee takes feoffment; this hinders the inrolment; because the taking of the livery has destroy'd the use which passes by the bargain. Quod fuit concessum. Yelv. 124. Hill. 5 Jac. B. R. In Case of Darby v. Bois.

2. *Grant of lands in possession.* A possession by wrong or by right is sufficient to pass lands granted by name of lands in possession; as an usual escape of lessee's beasts into a wood inclosed, but not leased to him. Roll. R. 20. Pasch. 12 Jac. B. R. Dockwray v. Befis.

3. *Possession countervails livery*; so that a gift in tail &c. to the lessee at will or tenant sufferance is good without livery and seisin. Noy. 56. Cooper v. Columbello.

4. Tenant for years cannot make a lease *within the statute of uses*, and by this means to give possession to the defendant to make him *capable of a release of the reversion*; per Powell J. Lutw. 570. Hill. 9 W. 3. In Case of Chaloner v. Davis.

See (F) pl.

4. 5. in  
Notia,—  
(G).

## (I) Pleadings. Possessionatus fuit.

1. *IN trespass* the defendant said that he leased to J. N. for life, who alien'd in fee to the plaintiff, by which he entered; and the plaintiff said that he *ne aliena pas*; and per Cur. this is a good answer; for per Finch. he has title against all by his possession, except against the plaintiff; and when the plaintiff has shewn cause of entry, and the defendant has travers'd this cause, this is sufficient. Br. Titles, pl. 6. cites 40 E. 3. 5.

2. In *trespass for taking of his cattle*, the defendant pleads that he was possessed of *Black-acre pro termino diversorum annorum ad-tunc & adhuc ventur*, and being so possessed, the plaintiff's cattle were doing damage, and he distrain'd them *damage feasant* there, and so justifies the taking &c. The plaintiff *demurs*, and assigns specially for cause that the defendant *did not particularly set forth the commencement of the years*, but only that he was possessed of an acre for a term of years to come; and regularly where a man makes a title to a particular estate, in pleading he must shew the particular time of the commencement of the title, that the plaintiff

Cro. Car.

138. SKK-  
VIL V.

AVERY ac-  
cordingly.

—3 Mod.

132. LANG-

FORD V.

WEBLER

accordingly.

—Carth.

9. S. C.—

And they

plaintiff may reply to it. The Ch. J. and the whole Court held that the plea was good. 2 Mod. 70. Pasch. 28 Car. 2. C. B. Searl v. Bunion.

took this difference where the plaintiff brings an

*action for the land, or doing of a trespass upon the land, he is supposed to be in possession; but if he will justify by virtue of any particular estate, he must shew the commencement of that estate, and then such pleading as here will not be good. But when the matter is collateral to the title of the land, and for any thing which appears in the declaration, the title may not come in question, such a justification as this will be good. In this case no man can tell what the plaintiff will reply; it is like the cases of inducements to actions, which do not require such certainty as is necessary in other cases. 2 Mod. 70. Searl v. Bunion.—So where an action is brought for a nuisance, and he intitles himself generally, by saying he is possessionat. pro termino annorum, 'tis well enough, and he need not set forth particularly the commencement, because he doth not make the title his case; for which reason judgment was given for the defendant. 2 Mod. 71. Searl v. Bunion.—But it has been since adjudged that possessionatus suit is not good, being pleaded in bar. Hill. 12 W. 3. Lutw. 1492. Pell v. Garlick.—S. P. Lutw. 1161. Fowkes v. Joice; but no judgment.*

One can't plead his possession in bar without more, except it be in the case of battery, where it may be merely collateral; and the true diversity is between a declaration and a plea; for one may count upon his possession without more, but not justify by virtue of it; for you can never give possession in bar without making a title. Per Powel J. 12 Mod. 508. Pasch. 13 W. 3. in Case of Pell v. Garlick.

3. Action upon the Case, in which the plaintiff declared, that [ 460 ] the first day of May in the first year of the present King and Queen, he was possessed of a house from which a course of water per & trans the garden of the defendant currere debuit & debet &c. The Court gave judgment for the plaintiff, Nisi; but an exception being taken, because he does not say that the water ever ran from the house, or that he was possessed of it, but only that debuit, the Court ordered it to be put into the paper again, & advisare vult; and afterwards this being a possessory action, it was ruled to be well enough. Skin. 316. Pasch. 4 W. & M. B. R. Jackson and Savage.

4. If it appears that the defendant is in possession, in such case the plaintiff ought to intitle himself; for he who will intrude and disturb my possession, ought to shew a good title to do it; but where the action is brought against a tort-feasor, not in possession, there it is sufficient for the plaintiff to shew a possession, and not to shew any other title, and by this give the defendant, who is a tort-feasor, an opportunity to dispute his title, but to shew a possession generally is sufficient; and if the defendant will compel the plaintiff to shew a title, he may do it by his plea, and compel him to make title in his replication. Arg. Skin. 622. Mich. 7 W. 3. B. R. In Case of Stroud and Birt.

5. Plaintiff declares that he was possessed of a tenement and a piece of land, to which he ought to have common levant and couchant upon his tenement in &c. and that the defendant had entered and made diverse holes in the acres, and stored them with conies, so that &c. The defendant demurred to the declaration. Judgment for the plaintiff in C. B. and a writ of error brought, and error assigned, that the plaintiff had not entitled himself to this common, but only said possessionat. & habere debuit; but the action was adjudged to be well brought, it not appearing that the defendant was in possession, but only a tort-feasor. The action was adjudged to be well brought upon the reason and au-

thority

thority of ST. JOHN AND MOODY'S CASE; but it would have been otherwise if it had appeared to be the land of the defendant. Skin. 621, 622. Stroud and Birt.

6. *No issue can be, or ever was, taken upon a possession only, viz. possessionatus vel non &c.* Carth. 445. Pasch. 10 W. 3. B. R. Silly v. Dally.

[For more of Possession in general, see Entry, Property, Right, Seisin, Trespass, and other proper Titles.]

## Possibility.

(A) Possibilities. *What shall be said to be good; and how consider'd in Law.*

See Maxims 1. *Possibilitas post dissolutionem executionis nunquam reviviscitur, & post executionem status lex non patitur possibilitatem.* Roll. R. 321. 3 Bulf. 108.

—Duplicationem possibilitatis  
*lex non patitur*; as if land is given to a man and to two women, and the heirs of their bodies. Per Coke Ch. J. 3 Bulf. 108. cites 44 E. 3. Fitzh. tit. Taille, pl. 13. and ruled accordingly, that where land was given to two men, and two women, and to the heirs of their bodies, it was but for life.

[ 461 ] 2. Possibilities are two-fold, viz. *possibilitas remota*, and *propinqua*. A possibility which shall make a remainder good, must be a common possibility, and potentia propinqua, as death, or dying without issue, or coverture, or the like; and not a remote possibility, which shall not be intended by common intendment to happen. 2 Rep. 51. a. Pasch. 30 Eliz. per Cur. in Cholmley's Case.

As 9 H. 6. 24. b. The remainder to a corporation not in being at the time of the limitation of the remainder is void, tho' such be erected afterwards during the particular estate; for this was potentia remota. Ibid. 51. a. b. And says this diversity well appears in the common case in our books, viz. If a lease be made for life, the remainder to the right heirs of J. S. this is good; for by common possibility J. S. may die during the life of tenant for life. But if, at the time of the limitation of the remainder, there be not any such J. S. but during the life of the tenant for life J. S. is born and dies, his heir never shall enter, as is agreed in H. 7. 13. b. And in 10 E. 3. 4<sup>th</sup>. the Case was that upon fine levied to R. he granted and rendered the tenements to one J. and M. his term for their lives, the remainder to G. son of J. in tail, the remainder to the right heirs of J. and in truth at the time of the fine levied, J. had not any son named G. but after he had issue named G. and died. And in præcipe against M. it was adjudged, that G. shall not take the remainder in tail, because he was not born at the time of the fine levied, but long after; by which another, who was right heir of J. by judgment of the Court was received; for when J. had not any son named G. at the time of the fine levied, the law does not expect that he shall have a son named G. after; for this is potentia remota.

3. In præcipe quod reddat against an abbot of land which is of their foundation, it is a good challenge to the array, to say, *that the founder was sheriff*, and the array is made by him or his bailiff, for the possibility which he has to have the lands if all the monks should die. 21 E. 4. 63. b. pl. 33. per Vavisor.

4. *Covenant to stand seised of land which the covenantor has not at the time of the covenant, tho' he purchases afterwards the land, yet no uses will arise.* Cro. E. 401. Trin. 37 Eliz. B. R. Yelverton v. Yelverton.

5. Possibilities which perhaps shall never happen, shall not *bar present and due debts* upon a bond. Arg. Bridg. 80. Hill. 13 Jac. cites 5 Rep. 28. b. Harrison's Case.

6. There cannot be a possibility upon a possibility by the rules of law. Arg. Cro. J. 461. Hill. 15 Jac. B. R. In Case of Child v. Bailly.

10 Rep. 50. b. in Lam-pet's Case. —Cro. C. 577. Mayor

Ac. of London v. Alford. —Pollex. 3. a. Pearce v. Reeve. —8 Rep. 75. Lord Stafford's Case. —2 Chan. Rep. 237. contra. That there may, and that in truth every executory devise is so. Per Lord Chan. Nottingham, 34 Car. 2. In the Duke of Norfolk's Case.

7. *The law respects present benefits more than future possibilities.* Arg. Cro. J. 481. Pasch. 16 Jac. B. R. cites 5 Rep. 25.

## (B) Grantable over. In what Cases.

1. **O**NE jointenant bargains and sells all the land, the other jointenant dies before enrolment; yet but one moiety shall pass. Mo. 776. In Case of Whitlock v. Hartwell, cites 2 E. 6. Brooke.

So if a joint-tenant cove-nants to stand seised to the use of A. of the

moiety of his companion after his death, no use shall arise, because 'tis only a bare possibility, Noy. 14. Whitlock v. Hartwell.

2. *Lease of land and 1000 sheep for 11 years, and lessee covenanted at the end of the term to leave 1000 sheep between two and four years old. They are not grantable over during the term; per tot. Cur. And per Windham J. If I lease sheep to A. for two years, now upon such lease somewhat remains in me; but that cannot be properly said a property, but rather the possibility of a property, which cannot be granted over.* Le. 42. Mich. 28 and 29 Eliz. C. B. Wood v. Foster.

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3. A copyhold was surrendered to the use of another in tail, and the surrenderor had issue three daughters and dies; and one surrenders in fee; and agreed, that if this was but a possibility, it could not be conveyed to the other by a surrender. Arg. Roll. R. 318. cites 33, 34 El. Gravenor's Case.

4. Fine by A. to the use of himself for life, remainder to his wife that should be at the time of his death for life, remainder to the son of A. in tail. A fine levied by A. and his wife, who afterwards survived him, and other uses declared is no bar to her, because it was uncertain who would be the person; but had the

Mo. 634; S. C. says, that War-burton, Walmley, & tota Curia held that the person

was barr'd by estoppel, but that Anderson and Kingsmill held, that the fine had extinguish'd the use by prevention.—Pl. C. 562. b. 563. Arg.  
*person been certain, there perhaps, notwithstanding it was but a possibility, it might have been a bar. Per two Justices. Cro. E. 826. Pasch. 41 Eliz. C. B. Wells v. Fenton.*

A possibility may be transferr'd by confirmation or release to him who has the possession of the land; per Croke J. and cites 4 Rep. 64. Fulwood's Case, and 10 Rep. 48. 2. LAMPETT'S CASE.—Cro. Car. 479. Baker v. Willis.—Ch. Prec. 484. Hill. 1717. in Case of Pinbury v. Elkin.—A notion has obtained at law that 'tis not assignable, but no reason for it, if it were res integra; but the law allows it to be released. Per Cowper K. 2 Vern. 563. Mich. 1706. Thomas v. Freeman.

5. A possibility cannot be transferred to another. Per Berkeley J. Cro. C. 477. Trin. 13 Car. B. R. In Case of Baker v. Willis.

6. Quære, Why the trust of a possibility in the remainder of a term is disposable over, and the possibility in interest in the reversion is not assignable? Chan. Cafes. 9. Hill. 13 and 14 Car. 2. In Case of Goring v. Bikerstaff.

7. *Cestuy que trust of a surplus* has no power to sell the estate or thing out of which the surplus is to arise, it being but a mere possibility. See Chan. Cafes 175. Trin. 22 Car. 2. Backhouse v. Middleton, and 208. Trin. 23 Car. 2. Lord Cornbury & Ux. v. Middleton.

### (C) Released or Discharged, In what Cases.

1. A Possibility of a use cannot be released or discharged. Arg. 1 Rep. 99. In Shelly's Case, cites 3 El. Wood's Case.

The daughter has a present interest, but 'tis such as can't be released nor granted. Per Coke Ch. J. 2 Bull.

130. cites Pl. C. 524. b. Welken v. Elkington.

2. Lessee for years devises his term to his wife, if she lived so long; and if she dy'd, then the residue to his daughter which should then be unpreferred, and dy'd; his daughter unpreferred released to her mother all her right in the said land. The mother dy'd within the term. The release shall not bind the daughter; because at the time of the release she had no title. Arg. 4 Lc. 135. says it was so adjudg'd 23 Eliz. in Falsor's Case.

3. If an award be that if A. give B. at Midsummer a load of hay, then upon the delivery of it B. shall pay 10 l. In this case the 10 l. cannot be released before the day; for it rests merely in possibility and contingency, whether it shall ever be paid; for it is only a duty on the delivery of the hay, and not before. Yelv. 215. Hill. 9 Jac. B. R. In Case of Bridges v. Eimon.

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 S. C. and P. cited Cro. C. 478. in Case of Baker v. Willis — And yet af-

4. Conusee of a fine of land in ancient demesne at common law releases to conusee in possession by his deed, or confirms his estate by his deed; the conusee shall retain and have the land, tho' the fine be annulled; because the release or confirmation made to him in possession makes his estate firm and rightful against releasor and his heirs. 10 Rep. 50. cites F. N. B. 98. and says this

this opinion was affirmed for good law per tot. Cur. in Lampet's Case. ter the fine levied the conuſor had not any right

in the land, but only poſſibility to have the land again after the fine ſet aſide by writ of diſceit to be brought by the lord of whom the land is held. 10 Rep. 50. a. Mich. 10 Jac. in Lampet's Case.

5. A future right or poſſibility *which may be releaſed*, muſt have foundation and original *inception*, and muſt be a neceſſary and common poſſibility. 10 Rep. 50. b. Mich. 10 Jac. Lampet's Case.—Cites 2 Rep. 51. Cholmley's Case.

6. A *releaſe* cannot be made when there is an *uncertainty in the perſon*, as leaſe for life, remainder to the *right heirs of J. S.* If leſſee is diſſeiſed, and the eldeſt ſon of J. S. releaſes to the diſſeiſor, and after J. S. dies, the releaſe is void for the uncertainty whether he ſhould be right heir at his father's death. 10 Rep. 51. Mich. 10 Jac. in Lampet's Case.

7. The law has allow'd releaſes of *rights*, which are in the nature only of poſſibilities, that a man may releaſe *to him that has the poſſeſſion* a poſſible right only, tho' it does not allow him to transfer or convey away to a ſtranger ſuch a right, and that is the reaſon the law allows a man to releaſe an *executory intereſt in a term* which he has deviſed to him, and is in the nature only of a poſſibility; but yet he *cannot aſſign it away to a third perſon*, tho' he may releaſe his right to the poſſeſſor of the land by way of extinguishment; per Ld. Ch. J. Trevor in delivering the opinion of the whole Court. 11 Mod. 152. Hill. 1707. C. B. in Caſe of Archer v. Bokenham.

8. A. deviſed to *M. his wife for life*, and after her death to *B. and his heirs*, provided if *C. within 3 months after M.'s death pay to B. 500 l. then to C. and his heirs*, C. may releaſe or extinguish his right; per Cowper C. and the Maſter of the Rolls. Ch. Prec. 486. Paſch. 1718. Markes v. Markes.

### (D) *Deviſed.* In what Caſes.

1. *Mortgage by A. to B.* for payment of 100 l. to B. or his heirs ſuch a day, and *before the day of payment B. deviſed*, that if *A pay the 100 l. J. S. ſhall have it.* Per omnes J. this deviſe of this poſſibility is not good, contra to 12 E. 2. Fitzh. Cond. 9. 3 Le. 125. pl. 244. C. B. Hill. 29 Eliz.

2. A. poſſeſſed of a *term*, deviſed the ſame *after his wife's death to B. his ſon*, and made the *wife executrix who proved the will and conſented to the legacy.* Afterwards *B. by will gave the lands to C. and died, living his mother.* The mother, after B.'s death, by her will gave the lands to J. S. Ld. Keeper decreed the lands to C. the deviſee of B. Pollex. 44. 16 May, 16 Car. 1. Veizey v. Pinwell. S. P. and tho' the executrix and deviſee for life aſſigned the term over to a ſtranger in truſt for her uſe, and ſo

to deſtroy the poſſibility, yet Ld. C. Elleſmere decreed that the poſſibility was founded upon a truſt that the executor ſhould preſerve the leaſe, ſo as it might go according to the will, for performance whereof the executor is a truſtee, and therefore B. is *ceſſy que truſt*, and that though the poſſibility be not grantable nor deviſable by the rules of law, yet *of the uſe ceſſy que truſt may declare his will*

as cesty que use might of lands before the statute of 1 R. 3. and so the will of B. amounts to a declaration of the trust, and ought to bind the executor trusted. Mo. 806, 807. Mich. 5 Jac. in Canc. Cole v. Moor.

\* S. P. And Ld. C. Parker decreed, that the administrator de bonis non &c. of B. assign over the term (the devisee for life being dead) to the devisee of B. the devisee of C. Mich. 1719. Wms's Rep. 572 to 577. Wind v. Jekyl and Albone.

3. J. S. devised to B. and the heirs males of his body, and for want of such issue to the heirs of B. in tail male, and for default &c. to C. and his heirs. C. during A.'s life devised the lands to D. Decreed the lands to D. Fin. R. 403. Hill. 31 Car. 2. Pitcairne v. Brace, Wheeler & al.

4. A. devised land to B. and his heirs in trust for C. and the heirs of her body, and for want of such issue the land to be conveyed to D. and his heirs. D. devised the lands to J. S. and dy'd, and then C. dy'd without issue, yet Chancery would not make good the devise by D. but resolved that D. had no estate devisable, but a mere possibility during the life of C. or any of her issue. 3. Lev. 427. in Canc. Trin. 7 W. 3. Bishop v. Fountain & al.

[For more of Possibility in general, see Devise, Grant, Release, and other proper Titles.]

### (A) Postea.

1. IT was said, that a man shall not aver against a postea in the King's Bench or the Common Pleas, to say, that it was contrary to the verdict; nor shall he be received to say, that the Judges gave a judgment, and the Clerks have entered it contrary to the judgment; but otherwise it is in Court Barons or other baze Courts, not Courts of Record. Ow. 49, 50. Pasch. 36 Eliz. Anon. cites 10 E. 3. 40.

Jenk. 216, 59. The Clerk may certify it, though his office is de-

termined; for he was sworn to execute the said office.—Clerks of assise and associates are to make return of postea, and deliver them to the prothonotaries on the quarto die post of the return of the writ of nisi prius. Rules of Prac. in C. B. East. 2 Ja. 2.

3. Upon search of the notes of the special verdict it appears livery and seisin was found. But the Clerk of Assise had omitted that

that in the entring of the postea. Resolved by the Court, that the Clerk should *amend* the postea, and then the record should be amended accordingly. Noy. 118. Hill. v. Prowse.—cites 4 Rep. 52.

4. The Court may stay the bringing in of the postea, and entring up of judgment upon a verdict, if they find cause to do it, viz. for some undue practice in the proceedings to the trial, altho' the plaintiff's cause was good; for it is not enough to have a good cause, but it must be also legally prosecuted. 2 L. P. R. 338. tit. Postea, cites Mich. 22 Car. B. R.

5. Error to reverse a judgment was assign'd in the postea, because it was not said, that the Justice of Assise associato sibi &c. as it ought to be by the statute. Roll Ch. J. said, The Justice of Assise may have a special commission to go the circuit alone, and then it must not be said so; but if it be *per formam statuti*, then it ought to be associato sibi &c. But the Clerk of the Assise may bring in his notes by which he made the postea, and amend it by them; for it is his fault to make the return so. Sty. 120. Trin. 24 Car. Lovel v. Knatchford. [ 465 ]

6. Altho' the verdict given be prejudicial to the plaintiff as he conceives, yet he ought to bring in the postea. 1651. B. S. 13 May. For he must abide by the trial, tho' it may prove prejudicial unto him, that if he will not enter the verdict the defendant may. 2 L. P. R. 337. tit. Postea.

7. A postea is a record of this Court trusted with the attorney in the cause by the Clerk of the Assise, and the attorney is bound, if he be so trusted, to deliver it into the office, that the judgment may be entred by it by the officer of the Court. Trin. 1651. B. S. And if he do it not, the Court will enforce him to do it. 2 L. P. R. 338. tit. Postea.

8. It is not necessary to annex the distringas unto the postea, altho' it is usual so to do. Trin. 1651 B. S. for they have no relation one to the other. 2 L. P. R. 338. tit. Postea.

9. There is no general rule of Court for the Clerk of the Assise to bring in the postea into this Court by a precise time; for sometimes possibly he may be able to bring it in sooner than at another time: but if he be negligent, and return it not in convenient time, the parties griev'd may move the Court or at the side-bar, and thereupon the Court will make a rule that he bring it in speedily, Mich. 22 Car. B. R. to avoid farther delay to the party concerned. 2 L. P. R. 337. tit. Postea.

10. Formerly after a nonsuit at the assizes for want of confessing of lease, entry and ouster, the plaintiff's attorney immediately made out a writ of possession: but the practice is since altered; so that now it cannot be done until after the postea comes in at the day in Bank; for it may be that there was not due notice of trial given; or there may be some other good reason sufficient to set aside the nonsuit. 2 L. P. R. 338. tit. Postea.

11. Note, that he who moves in arrest of judgment upon a declaration must always have the roll in Court. But in this Court they have only 4 days after term begun to move in arrest of judgment,

The defendant has four days by the rules of the

Court to speak in arrest of judgment after the *postea* is brought into the Court; and if the party for whom the

verdict passed, will not bring it in, upon notice given to him by the party that he intends to move in arrest of judgment, the Court, upon a motion setting forth this matter, will order judgment to be *flaid* until four days after it shall be brought in, that the defendant may have time to consider upon the record what to move out of it in arrest of judgment. 2 L. P. R. 337. tit. *Postea*.

12. *Postea* on *qui tam* prosecutions shall be delivered to the *prothonotary*, and not to the prosecutor. Rules of Pract. in C. B. East. 34 Car. 2.

13. When a *postea* is *misflaid*, we often order another to be made by the notes in the Clerk of Assizes book; per Holt Ch. J. Comb. 285.

14. A *fine* was set on several defendants, whereas the *postea* was not returned; whereupon the next day upon motion the rule for setting the fine was discharged. 12 Mod. 206. Mich. 10 W. 3. Anon.

After the *postea* is brought into Court, and the record has been read in Court, in order to the speaking to some matter in law in it, the attorney in the cause ought not to have the *postea* any longer in his custody, but it ought to remain in Court, and be filed of record in the Court. 2 L. P. R. 338. tit. *Postea*.

15. Once a *postea* is brought into Court, tho' the plaintiff take it out again, yet it remains in possession of the Court, and the officer of the Court may command the plaintiff to bring it in; and the defendant may give the plaintiff notice to bring in a *postea*, in order to move in arrest of judgment. 12 Mod. 385. Pasch. 12 W. 3. Anon.

[ 466 ] 16. If a *capias* be taken out and executed within 4 days after return of the *postea*, it is ill; secus if taken out within the 4 days and executed after; and if there be not 4 days in term after return of the *postea*, they must be made up in vacation before execution executed; per Holt Ch. J. 12 Mod. 502. Pasch. 13 W. 3. in Case of Spurraway v. Rogers.

17. In ejectment on the trial at the assizes, a Case was made and referred to the Judge of Assize, and he afterwards referred it to the opinion of the Court; and now a question arose, in what manner the *postea* is to be delivered to the party, whether by a certificate from the Court by rule to the Judge who tried the cause, and when by his order, or whether the Court should make a rule for the delivery thereof without applying to the Judge of Assize? The Court, after due consideration, made a rule for the delivery of it without any application to the Judge of Assize. Rep. of Pract. in C. B. 85. Hill. 6 Geo. 2. Makepeace v. Stevens and others.

18. On signing judgment, the *postea* is to be left with the clerk of the judgments. Rules of Pract. in C. B. Trin. 13 Geo. 2. Reg. 2.

[For more of *Postea*, see Amendment, and other proper Titles.]

Powers.

## Powers.

## (A) Powers to make Leases [in general.] To whom. [And How.]

[1.] IF a man covenants for natural affection to stand seised to the use of himself for life, with divers remainders over, with a power to make leases, he cannot make leases to strangers for money; for the leases ought to arise upon the first covenant, and then those strangers are not within the consideration of natural affection. Trin. 5 Ja. B. R. between \* Croffe and Barse; per Curiam agreed. 1 Rep. Mildmay. 176. b. resolved.]

\* Cro. 1. 180. S. C. by name of Crofts v. Fautenditch. — A power to make leases was reserved on a cove-

nant to stand seised to uses on consideration of natural affection. A lease was made for provision for younger children. Decreed good against the heir for two reasons, 1st. For that the law was not then adjudged in MILD MAY's Case. 2dly, Because the son did claim by the same conveyance by which the power was limited. Chan. Cases 263, 264. cited by Ld. Keeper, Mich. 27 Car. 2. as decreed by the Ld. C. Egerton, in Case of Prince v. Chandler.

One covenants to stand seised to the use of himself, remainder of one moiety to A. and of the other to B. in tail, remainder to his own right heirs, reserving to himself a power to dispose of the estate for life, lives, or years, for the better payment of his debts and legacies; accordingly he makes a lease for 1000 years, and well he might; for it was his own estate, and therefore in settling it he could reserve to himself what liberties he pleased. Arg. Mo. 145. Hill. 26 Eliz. Mildmay v. Standish.

[2. So by force of such power he cannot make leases to any of his blood; because the proviso and power was void in the creation, in as much as it was to lease to any person, as well those that are out of the consideration, as those that are within the consideration. Co. 1. Mildmay. 176. b. Curia.]

Upon covenant to stand seised, a man cannot reserve power to make leases or jointures,

or to prefer younger children; but upon estate executed, he may; per Moore. Arg. Mo. 381. Mich. 36 & 37 Eliz. in Perrot's Case. — Because it was general, and not to any particular purpose, nor upon any particular consideration, no use can arise out of the covenant to stand seised, as it might out of feoffment or fine, so that a lease made by the husband was void, and in debt by the wife after his death it was adjudged that no rent was due. 1 Lev. 30. Pasch. 13 Car. 2. [ 467 ]

B. R. Dorothy Chute's Case. — Arg. Mo. 373. in Perrot's Case. — S. P. but it may be done by fine or transmutation of possession, if the covenant be, that the owner will stand seised to those uses. Cary's Rep. 30. cites 27 June 1602. 45 Eliz. — S. P. per Cook attorney-general. Goldsb. 173. that such power cannot be reserved by way of covenant, but may by feoffment to uses; and it was said by Walter to have been adjudged on a writ of error in \* SHARINGTON's Case, That if a man covenant with his eldest son in consideration of natural love to stand seised to the use of himself for life, the remainder to his eldest son in tail, with proviso, that he himself might make leases to his second son, or to any other of his kindred for 21 years or three lives, this was held good; for they to whom the leases are to be made, are within the consideration, viz. of the blood, and so the use may well arise to maintain those leases; but if the proviso had been to make leases to any man, and he by force thereof made leases to his second son, those leases are void, because not within the consideration of the covenant by intentment of the law at the first; for the law at the beginning adjudged the proviso merely void. — \* S. C. Pl. C. 300. Trin. 6 & 7 Eliz. Sharington and Pledall v. Strotton.

[3. If

giving her this lease is idle; and the meaning is so;

without doubt the feme hath the sole estate in law in her, and the power given her is but a restoring to her of that which she had before by the law; and her consenting to the legacy doth not [ 469 ] take away her power to make estates. And this limited power, and the remainder of his daughter may stand together; for it may be that the wife would not make such a lease, and then the daughter should have had the land in tail; but if she dispose of it, the daughter shall not have it. Jerman agreed with Roll. Nicholas J. held, that the feme could only dispose of the land during her life; and that the testator's intent by the words was, that the feme should not be tied to occupy the lands herself during her life, but might dispose of them. Alf. held according to Nicholas, that she can dispose of the lands only during her life; for the power is only given during her life; and this interpretation will make all parts of the will stand together, better than the other interpretation. Adjourned.

Sec(A. 5)— [ 11. If a power be to make leases for three lives, or 21 years, of Vaugh. 33. lands usually letten; lands which has been three times letten, is Tristram v. Roper. S. P. within the proviso. P. 2 Ja. B.]

Sec(A. 5)— [ 12. So land which has been twice letten is within the pro- 2 Jo. 37. vifo. P. 2 Ja. B.] S. P. by Vaughan

Ch. J.—Vaugh. 33. Hill 19 and 20 Car. 2. in C. per Vaughan Ch. J. in Case of TRISTRAM v. ROPER, and said the words (usually demised) might be taken in two senses; first, for the often farming or repeated acts of leasing; secondly, for the common continuance of lands in lease; for that is usually demised; and so land leased for 500 years long since is land usually demised, that is, in lease, tho' it has not been more than once demised, which is the more received sense of the words (land usually demised).—Land which has been usually let at will rendring rent is said to be usually demised. Per Cur. Cro. J. 76. Trin. 3 Jac. B. R. in Case of Raugh v. Haynes.—Land usually demised by copy of Court, but never otherwise before than by copy only, may be said land usually demised. Mo. 759. pl. 1050. Pasch. 3 Jac. Banks v. Brown.

[ 13. But land which has been but once letten, is not within Fol. 262. the proviso. For usus fit ex-iteratis actibus. P. 2 Ja. B.]

Sec(A. 5)—S. P. per Vaughan Ch. J. in delivering the judgment of the Court. 2 Jo. 37. in C. B. Tustian v. Roper.

Sec(A. 5). [ 14. If land has been leased by a contract from year to year for three years, it is not within the proviso; for it is but one lease. Contra. P. 2 Ja. B.]

Sec(A. 4) [ 15. If a conveyance be made to uses of diverse manors and lands, that is to say to the use of J. S. for life &c. with a power to make cited 12. leases of the premisses, or any part or parcel of it, for three lives, or Mod. 151. years determinable upon three lives, ita quod such rent, or more, be reserved upon every lease, than was reserved or paid for it within two years then next before, and some of the land was not leased before at any rent within the two years; he may by force of this power make such lease of this land, reserving what rent he please. For it appears by the generality of the words that it was intended that he should have power to lease all the land; and this is not like to leases to be made by force of the statute of 32 H. 8. or 13 El. for there the intent is apparent that no land should be leased, but that which was leased before. Tr. 10 Car. Cum- bersford's Case. Resolved by the three Chief Justices upon reference to them out of the Court of Wards, as Master Cholm- ley said to me, and this concerned Master Chamberlain of the

Court of Wards. And Sir Henry Calthorpe, the now attorney of the Court of Wards, shewed me the report of it, he being of counsel against this resolution.]

for the tithes is good. 2 Lev. 150. Walker v. Wakeman.

—Vent. 294. S. C. but says the rectory was demised reserving a rent, and that the rectory consisted of tithes only, and resolved that the lease was good; for the *last clause being affirmative, shall not restrain the generality of the former*; and says the resolution was chiefly grounded on the Case of CAMBERFORD, reported here by Roll. — S. C. cited by Holt Ch. J. who said that tho' the words of the qualification are general, yet the Application may be particular. 5 Mod. 382. in Case of Winter v. Loveday. — S. C. cited Holt Ch. J. 12 Mod. 151. in Case of Winter v. Loveday.

16. A. had a wife and one child; B. by indenture between him of the one part, and A. his wife, and the children betwixt them begotten at the assignment of the husband, of the other part, *leased land to A. his wife and their children, at the assignment of A. for years.* Afterwards several other children were born, the wife died, and A. *assigned to an after-born child.* But it was held per Cur. that this was not within his power; and so adjudged. Trin. 26 Eliz. Cole v. Friendship. [ 470 ]

17. A. devises land to B. an infant. — A. can't appoint that C. shall lease the land in B.'s name; but if A. had devised that C. should make a *feoffment*, or a *lease for life*, in such case C. had an interest; for otherwise he can't make livery; and none can authorize any to make leases in the name of another, but of him in whose name the lease ought to be made. Cro. E. 678. 734. Trin. 41 & Hill. 42 Eliz. B. R. Piggot v. Garnish.

18. If a power be reserved to make leases by a *covenant without transmutation of possession*, Chancery will not help, because the first is void in law. If upon *transmutation* of possession, and the power not precisely followed, that is doubtful, and rather most strong against help; for then the estate works, and the power gone; and upon wills no help. Per Egerton C. 11 October, 1 Jac Cary's Rep. 41. Pigot's Case.

19. Where a man has power to make leases &c. which shall charge and incumber a *third person's estate*, such powers are to have a rigid construction; but where a power is to *dispose of a man's own estate*, it is to have all the favour imaginable. 2 Vent. 350. Pasch. 33 Car. 2. Sayle v. Freeland.

8 Mod. 250. cite. 6 Rep. 32. Fitzwilliams's Case. — Gibb. 214. 219. Hill. 4 Geo. 2.

B. R. Fitzgerald v. Lord Fauconberge. — So where the power is reserved to one that should have been heir to the estate, if no settlement had not been made; but otherwise, in case of the estate being settled on a stranger. Arg. 9. Mod. 13. Mich. 9 Geo. Lady Coventry's Case.

Tho' a more favourable construction is to be put upon a power reserved to the owner of the estate, yet that is to be understood of a *voluntary conveyance*. Gibb. 220. Hill. 4 Geo. 2. in Canc.

20. The admitting at law powers of revocation of uses was after the statute of uses, but it was some time after that before a *constructive revocation* was allowed of; per Jekyll Master of the Rolls, who said that Scroopt's Case 10 Rep. 143. 144. was founded only on one authority, which was the Case of Frampton v. Frampton, cited there. Gibb. 218. Hill. 4 Geo. 2. in Canc. in Case of Fitzgerald v. Lord Fauconberge.

(A. 2) *Extent thereof.*

1. **WHERE** a man's power is limited to *lease lands so specially qualified*, that is, to let and set as usually at any time before, when he could not lease at all without such special power given him, he is *absolutely barr'd* from leasing land, which is not so qualified. Vaugh. 33. Hill. 19 & 20 Car. 2. C. B. Tristram v. Ballinglafs al. Roper.

2. A lease within a power to *demise in possession* must be *construed* of a lease to commence in possession after another lease or interest already created before the reservation of the power, and not after; per Holt 2 Salk. 537. Mich. 9 W. 3. B. R. Winter v. Lovedore.

3. Where a *qualification* is annexed to a power of leasing, which if observed goes in *destruction* of the power, the law will dispense with such qualification; as power to *lease a manor, or any part thereof, so as the ancient rent be reserved*; yet he may by this power lease the *services* parcel of the manor on which no rent can be reserved, otherwise the express power would be defeated. Per Holt Ch. J. Carth. 429. Mich. 9 W. 3. B. R. Winter v. Loveday.

mentioned likewise in the settlement; and even as to the manor the power is not wholly void; for he may thereby lease the rents and services, tho' no rent can be reserved thereout. Per Holt Ch. J. 12 Mod. 151. S. C.

[ 471 ] (A. 3) Where the Power is *pursued*. In respect of the Years or Lives limited.

See (A) pl.  
3, 4, 6, 7,  
8, 9.

But if a man has power to make leases so as the same do not

1. **POWER** in uses to make leases not exceeding 99 years *a tempore confectionis*; he leases for 50 years *a die* confectionis, it is not good. Mo. 733. in marg. cites 34 Eliz. Harcourt v. Poole.

exceed 99 years a confectione, if he makes a lease for 60 years to commence 20 years after, it is good; for he does not exceed the number of 99 years from the making the lease. And. 274. Mich. 33 Eliz. in Case of Harcourt v. Pole and Seles.

2. A. made a jointure on M. his wife, with power to make leases for 21 years *in possession*. A. died; M. married J. S. and then J. S. and M. made a lease to commence *in presenti* of lands, some whereof were *in lease before*, and so the lands not in possession. As to the executing such power by the wife and her second husband, it was held well executed; but that by this power a lease could not be made of lands \*not in possession. Hill. 14 & 15 Car. 2. in Canc. Per Lord Chancellor, assisted by Bridgman and Hale. Sid. 101. D. of Buckingham v. Ld. Antrim & Ux.

\* Cro. J.  
318, 319.  
Shecomb v.  
Hawkins.

3. R.

3. R. seised of lands in fee made a lease for 99 years, if three persons or any of them should so long live. R. levied a fine thereof to the use of A. for life, the remainder to B. for life, the remainder to C. in tail; proviso that every of them may successively make leases for 99 years, or three lives in possession, or for two lives in possession and one in reversion, or for one life in possession and two in reversion; during the first term A. made a lease for life to the defendant. Keeling J inclined that this lease is within the power; for the settlement being only of the reversion, a present lease of the reversion is within it. Windham and Twisden held that the settlement being of a reversion, if the words of the power had been general to make leases, lease of the reversion, or lease in reversion had been within it; but the power being expressly to make leases in possession, this lease in reversion is not within it. Sed adjournatur. Lev. 167. 168. Trin. 17 Car. 2. B. R. Opy v. Thomafius.

Sid. 260. S. C. says it was admitted not to be within the power. But judgment was given upon another point; viz. that the lease was not avoidable by connuee of a fine levied by tenant in tail.

4. A. tenant for life, with power to lease for three lives, remainder to B. his son; remainder to the right heirs of A. in fee. A. made a lease for three lives, and died, and then living those three lives, B. made a lease for two lives. Resolved that this lease in reversion by B. is not good; for now the premises are charged with five lives instead of three. Carth. 257. Hill. 4 W. & M. B. R. Simmonds v. Cudmore.

5. Power to demise for one, two or three lives in possession, or in reversion for one, two or three lives, or thirty years, or for any number of years determinable on one, two or three lives, so as such demise be not of the demesne lands. He may make a lease in reversion for thirty years absolutely, by virtue of this power, because the limitations and restrictions are disjoined, and the latter part is carried on by way of enlargement of the power; per 3 J. contra Rokeby J. 2 Salk. 537. Mich. 9 W. 3. B. R. Winter v. Loveday.

This power to make a lease in reversion must be taken to be a lease of the reversion itself, and not a concurrent lease; and it cannot be otherwise, in case of

because a freehold cannot commence in futuro. Per Holt Ch. J. Arg. Carth. 429. Winter v. Loveday.—5 Mod. 383. S. C..

6. Where there is a power given to make leases in possession and reversion, in such case if a lease be made in possession, and afterwards some life drops, he can't make a new lease in reversion of the same lands, because his power is executed by making the first lease. Per Holt Ch. J. Carth. 429. Mich. 9 W. 3. B. R. Winter v. Loveday.

(A. 4) Where the Power is pursued in respect of the Rent reserved. Ancient Rent. [ 472 ]

See (A) pl. 45.—See Rent.

1. POWER reserved to make leases, reserving so much rent or profit as had formerly been reserv'd upon every demise for 21 years, or three lives in possession only. It was held, 1. That  
P p 2 lands

\* Power to make leases reserving such yearly rents or more, as the same were then let at. Lands demisable by this power, must be lands then in lease, on which some rent is reserved, and a lease of the capital mesuages, without any rent reserved, and which was not in lease at the time of the power reserved, is not a good lease. 8 Mod. 249 Pasch. 10 Geo. Baggot v. Oughton.—Vaugh. 35.—Affirmed per tot. Cur. on a further argument, and afterwards affirmed by Lord Chancellor, and affirmed afterwards in the House of Lords. 8 Mod. 381. S. C.—† A lease by virtue of a power was made of the land *inter alia* reserving *proinde* the rent of 6s. per annum, and avers that the ancient rent was 6s. per annum. This was objected to be no good reservation; for that the rent issues out of other lands, as well the land within the power, and so cannot be said to be the ancient rent reserved upon that; but the Court said it might be intended that the *inter alia* might comprehend nothing but such things out of which a rent could be reserved, and then the 6s. was reserved only for the land within the power: however the *proinde* might reasonably be referred only to the land within the power, and not to the *inter alia*, and that a distinct reservation might be for that land. And so judgment was given for the plaintiff the lessor. Vent. 339. Trin. 31 Car. 2. How v. Whitfield. B. R.

\* lands in possession of feoffor may by this power be demised without rent. 2. If several parcels are demised in one lease, as here, and several rents upon each of them, and some more and some less than usually before or at the time of the feoffment, but the intire rent or profit is reserved in the whole, yet it is not good for those which have less rent put upon them, tho' it is for the others. 3. Here one piece of land was demised *with another*, and no more rent put upon it; and held not good, tho' it don't appear that any thing had formerly been reserved to the lord, but something given to the bailiff for the other. 4. In former leases the coppice-woods had been reserved to the lord in a piece of land called the Park, and 40 l. rent was reserved for it, but now is demis'd for the *same rent*; with *coppices added*; and this was not insisted upon, because void for the other point; and for the coppice it seems less profit in this case, tho' perhaps rent is not reservable out of them, and the power is, that the *same rent* or profits shall be reserved. 5. If the bailiff demise a farm, and reserve part to himself, and raise the whole rent to the lord of the residue of the land, this is not in rent or profit to the lord formerly reserved. Clayt. 99. Aug. 23. 1641. Campian v. Thorp.

2. Power to make leases for 21 years, rendring rent 10 l. per annum payable at Michaelmas or twenty days after; and he made a lease for 21 years, rendring 10 l. rent payable at Michaelmas, no judgment whether the power was well pursued. Allen 90. Mich. 24 Car. B. R. Ludlow v. Beckwith.

3. One by virtue of a power makes a lease, and reserves two parts in three of the improved value as a rent, without mentioning any sum certain, so as the rent is uncertain, and lies only in averment, which if averr'd by the plaintiff at law and disproved, he would be nonsuited in any action. The Court declared it a good lease, and decreed that the sum paid, viz. 290 l. per ann. (if no greater value be proved) should be the stinted sum, tho' the premises should rise or fall in value. 2 Ch. R. 156. 31 Car. 2. Audley v. Audley.

4. In ejectment the Case was; Sir John Fortescue seised in fee, by lease and release settles the lands in question to the use of himself for life, and then to trustees for 99 years, if A. B. so long lived, upon such trusts &c. as he shall direct; and after to the first son of J. R.

J. F. &c. with power to make leases with fine or without fine, and rendering such rents and services as he shall think fit; after this he by another deed declares the trusts of the term, and after this he makes a lease without rendering rent to Talbot, who was the lessor of the plaintiff. It was objected that here \* no rent was reserved upon the lease, and some rent ought to be reserved; and there not being any, his power is not well executed: non allocatur; for it being to reserve such rent as he shall think fit, and he having thought fit to reserve no rent, this shall not avoid the execution of the power, and especially he not having said *such yearly rent*; so that a pepper-corn reserved payable 40 years after had been sufficient; and therefore such matter should not be regarded as a cause sufficient to avoid the lease, where he had made it subject to a trust to pay the rents, issues and profits to such persons as he shall direct; and so the Court ruled and directed the jury to find for the plaintiff. Skin. 427. Pasch. 6 W. & M. B. R. Talbot and Tipper.

5. Power to make leases of several manors, reserving the antient and accustomable rent, or more: he comprises them all in one lease, and expresses the reservation in the very words of the power. It was decreed not well pursued, per Lord Chanc. Cowper and Lord Trevor, Hoit Ch. J. contra. 3 Ch. R. 102. Orby v. Lord Mohun.

2 Vern. R. 531, 542  
Pasch. 1706.  
S. C.—  
9 Mod. 14.  
S. C. cited  
—S. C.  
Chan. Prec. 257. Trin.

1706.—S. C. cited by the Master of the Rolls. Hill. 1731, and said that it was afterwards affirmed in the House of Lords. 2 Wms's Rep. 599.—S. C. cited Arg. 10 Mod. 473. says, that tho' this was such a defect as this Court by sending it to a Master might have supplied, yet it would not interpose, because to the prejudice of a third person, viz. the remainder-man.—2 Freem. Rep. 293. S. C. and that the execution of a power ought not to be in the words of creating the power; for suppose the power had directed the leases to be made (under the same covenants), sure it would not have been good to make a lease generally saying (under the same covenants), without inserting any covenant; or suppose the same had been upon an alternative, reserving one or the other of two things, it could not have been a good execution of it to have reserved it so in the lease; but it must have been reduced to one of them.

(A. 5) Where the Power is pursued, in respect of the *Thing leased*.

See (A) pl. 5, 11, 12, 13, 14.

1. Settlement of a manor with power to demise the premises, so as such demise be not of the *demesne lands*. Copyholds are within the exception. And if there were nothing else for the power to work upon in this case, he may by virtue thereof demise the *rents and services*. 2 Salk. 538. Mich. 9 W. 3. Winter v. Lovedore.

Carth. 428.  
S. C.—  
5 Mod. 244.  
S. C.—382.  
per Holt  
Ch. J. S. C.

See (A) pl. 10. (A. 6) To make Leafes. Well purfued or executed; In refpect of the *Eftate of the Perfon doing it.*

1. **A** *Devised to B. in tail, the reversion to C. in fee, upon condition that B. grant a rent-charge to D. in fee; and adjudged that this is a good rent-charge, and fhall bind him in the remainder after the tail determined.* Noy. 80. in the Case of DANIEL V. UPTON, cites 10 H. 7. 20.

Dal. 42. pl. 82. S. C.

2. A ftatute was made 2 & 3 P. & M cap. 4. by which an authority was given to Cardinal Pool to *dispose, order, employ, and convert the benefices appropriated to the increafe and augmentation of the livings of the incumbents* there. The Cardinal made a leafe for term of years of a parfonage appropriate. And it was held, that this leafe was void; for he *had no authority, but to the intent fpecified in the fame ftatute*; for he had not the fee fimple given to him by any words in the fame ftatute, and yet the fee fimple was out of the perfon of the Queen by the fame ftatute; for fhe thereby renounced all her intereft and right in them. And for fo much Dyer faid, that the fee fimple was in abeyance. But Wefton faid, that he had always taken it that the fee fimple was in the Queen. Mo. 42. pl. 129. Trin. 4 Eliz. Cardinal Pool's Cafe.

[ 474 ]

3. Husband and wife feifed of lands in right of his wife, *levied a fine to the ufe of themfelves for their lives, and after to the ufe of the heirs of the wife, provide that it fhall and may be lawful to and for the husband and wife at any time during their lives to make leafes for 21 years, or three lives.* The wife being covert, made a leafe for 21 years; adjudged a good leafe againft the husband, tho' made when fhe was a feme covert, and by her alone, by reafon of the provide. Godb. 327. pl. 419.

4. A fine was to the ufe of *A. for life, the remainder to his executors administrators and assigns for 80 years, with power to him and his assigns to leafe in poffeffion or reversion for 21 years, determinable upon three lives, referving the ancient rent.* *A. devised the term of 80 years to B. and died.* *A.'s executors affented, and then B. died, and it came to B.'s executors, who affigned it to W. R. and W. R. made a leafe.* The Court was of opinion, that W. R. tho' affignee after fo many removes, might execute this power, and that affignees might include affignees in law, as well as fact. But however, that *A. devifing this term to B. the faid B. was affignee, and the power in the greateft ftrictnefs of acceptation was in him, and confequently muft go to his executors, and by the fame reafon to their affignee.* Vent. 338, 339. How v. Whitfield.

(A. 7)

(A. 7) *Where the Power is exceeded. How it shall be ; Where it is to Lease or Charge.*

1. **W**HERE a man has a warrant to do a thing, and he *does it and more, so as he exceeds his warrant, yet it is good for that part for which it is warranted, and void for the rest ; as if a man makes a warrant of attorney to make livery and seisin of the manor of Dale, and he makes livery of the manors of Dale and Sale, it is good for the manor of Dale, and void for the manor of Sale ; per Dyer J. 3 Le. 29. Mich. 15. Eliz. C. B. in Sir Peter Philpot's Case.*

S. P. 1 Lev. 141. Mich. 16 Car. 2. Arg. in Case of Jenkins v. Keymis. —So if a power be to charge land with 7000l. for children's portions, and

*he charges it with 8000l. it is good as to the 7000l. G. Equ. R. 168. Pasch. 8 Geo. 1. cites Parker v. Parker.*

2. A. has power to make a lease for ten years, and he makes a lease for 20, the lease shall be good for the ten years ; said to be so settled several times in this Court. 3 Ch. R. 11. 26 June 15 Car. 2. Parry v. Brown.

Nelf. Ch. R. 87. Parry v. Bowen. —Chan. Cases 23 S. C. Trin.

15 Car. 2. by name of Pawcy v. Bowen. —So if a power is given to A. to lease for 21 years, and he leases for 21 years, and limits a further interest by the same deed, thus, viz. *and from and after the term aforesaid for one year more ; the power is well executed by the first limitation, and the excess is surplusage not to be regarded. But per Cur. there is a difference where the limitations, tho' several, make but one estate, and where several estates. Gibb. 157. Mich. 4 Geo. 2. C. B. in Case of Peters v. Malham.*

3. A settlement is directed to be made on A. with a power to make a jointure of a moiety. But before the conveyance made by the trustees to A. he made a jointure of more than a moiety. Upon this matter being mov'd to the Court, Ld. Ch. Parker said, that here neither is nor can be any jointure ; for A. has no legal estate, and so can pass none, and therefore could take no notice of this equitable appointment, nor can it properly come in question at this time, not being to take effect till after A.'s death, and perhaps never will, as he may survive his wife. Wms's Rep. 604. Hill. 1719. Blackborn v. Edgley.

(A. 8) *Where it is well executed.*

[ 475 ]

1. **G**RANT of authority to make estates of his lands ; by those general words, he may make leases for years, or life, or gifts in tail, feoffments or other estates whatsoever. Arg. 4 Le. 65. Pasch. 24 Eliz. Countess of Suffex v. Wroth.

2. He that has reserved power upon a feoffment of uses to make leases may execute his power in words limiting the use without words of demise of the land. As if he says, I limit the use for 21 years or three lives to such persons, this is good estate within the power ; because the proper operation of the power is to limit the use, and not to give the estate of the land, but this comes after by the statute of 27 H. 8. Arg. Mo. 514. Mich. 37 & 38 Eliz. in Ld. Buckhurst's Case.

Where *tenant for life* has power to make leases, it is not always necessary to recite *his power* when he makes a lease.

But if he makes a lease which will not have an effectual continuance, if it be *directed out of his interest*, there it shall be as if made by virtue of his power; per Hale. Vent. 2:8. Mich. 24 Car. 2. B. R. said it was so resolved in one Rogers's Case.

S. P. per Hale Ch. J. and says, it was so adjudged so lands in Blandford Forum. Vent. 291. cites Rogers's Case.

The reason of its being a forfeiture is, because the proviso for making leases extends only to a declaration of use for three lives or 21 years, and therefore when he deals with the possession by livery, he exceeds the power and forfeits his own estate. Arg. Mo. 14. Mich. 37 & 38 Eliz. in L.D. BUCKHURST'S CASE says it has been so held.——Hale said, he conceiv'd it no forfeiture; because the lease takes effect by the deed, and to the livery comes too late. Vent. 291. in the Earl of Leicester's Case.

3. *Tenant in tail with power reserved to lease for life or years*, makes a lease for life to J. S. and dies without issue. The lease was generally made without declaring whether he made it by virtue of his interest as tenant in tail, or by virtue of his power reserved; whether it be good or not dubitatur? Mo. 645. Pasch. 44 Eliz. Bibbel v. Dringhouse.

4. If *tenant for life be with power to make a lease for life*, this power is well executed by deed *without livery*, and better than with it; for per Twissden J. if livery had been made, it has been held that it should be a forfeiture; but Hale Ch. J. denied that; for by the sealing of the deed the power is executed, and the livery void. 2 Lev. 149. Mich. 27 Car. 2. B. R. in Case of Wigson v. Garret.

### (A. 9) Determined, or extinguished.

1. A. Leases for life to B. and afterwards levies a fine to the use of R. for life, the remainder to A. in fee, with a proviso or power to make leases for 21 years, or three lives, and that the devisees should stand seised to such uses. And afterwards A. covenants to stand seised to the use of P. in tail, with divers remainders over. And after A. grants the reversion aforesaid to L. for life, who distrains C. and avows, and judgment was given against the avowant; because by the covenant to L. A. had destroyed his power to make leases &c. Noy. 66. Cooke v. Bromehill.

2. In ejectment the case was, Sir John Fortescue seised in fee, by lease and release settles the lands in question to the use of himself for life, and then to trustees for 99 years if A. B. shall so long live, upon such trusts &c. as he shall direct, and after to the first son of J. F. &c. with power to make leases with fine or without fine, and rendering such rents and services as he shall think fit; after this he by another deed declares the trusts of the term, and after this he makes a lease without rendering rent to Talbot, who is the lessor of the plaintiff. To this, objection was taken, for that he having declared the trusts of the term for payment of his debts, the estate is bound by it, and he may not execute his power to make leases after: non allocatur; for the term was originally subject to the power, being contained in the same deed, and he having executed his power, the leases are precedent

precedent to the term, and controul it. Skin. 427. Pasch.  
6 W. & M. B. R. Talbot v. Tipper.

(A. 10) To make leases. *Decreed, tho' not strictly pursued.*

1. **M.** In pursuance of a power reserved to her by a marriage settlement to make leases for three lives or 21 years of any part of her estate, in consideration of her owing several debts, and particularly 200l. which J. S. was bound for, demised to the said J. S. his executors &c. for 21 years, to commence from and after the 25 March then next ensuing, for saving harmless the said J. S. his heirs &c. from the said bond. It was insisted, that the power reserved to her was only to make a lease or leases in possession, and the lease made to J. S. was to commence from a time to come, so that the same was void in law. The Court was assisted with the Judges, and it appearing that the debt now in question was taken up and employed for the use of the defendant, who created the trust for the payment of her debts, and she by virtue of the power reserved to her before marriage received the profits of the premises, and altho' the lease granted to J. S. may not in strictness of law be a good lease, yet this Court was satisfied that the same doth amount to a good declaration of her power in equity to make a lease for 21 years in being. 1 Chan. R. 185, 186. 12 Car. 2. Pollard v. Lady Greenwill.

Chan. Cases  
10. Hill. 13  
& 14 Car.  
2. S. C.—  
But where  
it is raised  
by a *voluntary conveyance*, it is  
without help  
in equity.  
Per opinio-  
nem Cur.  
but ordered  
to search  
precedents,  
and there-  
upon a pre-  
cedent was  
produc'd for  
the plaintiff,  
viz. 6 July,  
40 Elis.  
\* PRINCE  
AND UX v.  
GREEN.  
The father  
being seised

in fee, settled the lands by a covenant to stand seised to the use of himself, remainder to his eldest son in tail, reserving a power to himself to make leases of part of it for 30 years which accordingly made a lease for the benefit of a younger child, which came by assignment to the plaintiff, and which the eldest son would have avoided, because the power was not well raised by a covenant to stand seised. But it appearing to the Court, that the eldest son was greatly advanced by the father, and that the conveyance, which was by covenant to stand seised, was intended to be by livery; and being advised that it would be as well by covenant to stand seised, the Court did decree, that the plaintiff should hold till the defendant evicted him by law; and did decree likewise, that the defendant should admit the power to make the lease good in law, if he did not prove an entail paramount that settlement. Nels. Chan. Rep. 115, 116. 19 Car. 2. Miller v. Kendrick and Vylett. — Chan. Cases 19. S. C. by name of Wilmer and Ux v. Kendrick and Vylett. — Ibid. 161. \* S. C. cited by name of Prince & Ux v. Green. — [But it does not appear in either of those books what the Court decreed in the Case of Miller v. Kendrick.]

2. A man made a *voluntary settlement* on his son for life, and after to his first and other sons in tail, with power for the son to make a lease in possession for 99 years, determinable on three lives, and also to make leases for 60 years to commence after his death, if he had issue male, to continue so long as he had issue male; the son makes a lease to his father in trust for one of his younger children; but the lease was not pursuant to the power; yet it was decreed good, and taken to be as a lease made by the father after a voluntary settlement. Abr. Equ. Cases 342. Mich. 1698. Gooding v. Gooding.

(A. 11) *Defective Powers supplied in Equity.*

1. **B**Ecause a *fine* was *not levied according to covenant*, a power became void to make leases; but decreed in May 13 Car. Toth. 166. Scambler v. . . . .

2. If the *limitor's power* by the limitation be *defective*, his *interest ought to come in aid*, and supply it to make good such limitation as he shall make after. Chan. Cases 8, 9. Hill. 13 & 14 Car. 2. Goring v. Bickerstaff.

3. A. grants a term in trust to raise 1000l. Afterwards A. grants a 2d term in trust to raise 1000l. more. The 2d term happens to be void. The trust of the 2d term shall be *transferred on the first term* on which the grantor had power to charge it, subject to the payment of the other 1000l. first. Chan. Cases 290. Mich. 28 Car. 2. Bisco v. the E. of Banbury.

(A. 12) *What is a good Power to charge Land.*

1. **A** Good execution will not profit where the *constitution is defective*; as A. reserv'd a power to himself *to limit uses to any body*. This limitation in general being utterly void, he could not limit any use to his daughter. Hcb. 151. cites 1 Rep. 175. Mildmay's Case.

2. Devise to A. *for life*, and then *to be at her disposal* to any of the children. This is a *collateral power* and arises after the estate, and has its effect on another interest, so that the estate for life is perfect without it, and not altered or affected by the execution of it; and it is not a *power appendant* or appurtenant or in the nature of an emolument to an estate, like a lease for life, with a power to make a lease for 21 years; for that affects the estate for life, and is concurrent with it, and has its being and continuance at least for some part out of it. 1 Salk. 240. Pasch. 10 Ann. B. R. Thomlinson v. Dighton.

(A. 13) *Extent of Power to charge Land.*

1. **W**HERE the testator gives a power to *sell lands*, he may sell his *inheritance*; because he gives the same power he had himself, and in such case the purchaser shall be intitled by the will. 3 Salk. 277. pl. 7.

1 Lev. 151.  
Jenkins v.  
Keymis.

2. Power to charge lands with a sum of money *imports interest also* for the sum. 2 Salk. 538. In Canc. 12 Ann. Kilmurry v. Geery.

See (A).

3. A *general power* to raise daughters portions *restrained by a particular proviso*. MS. Tab. tit. Power, February 16th, 1718. Fane v. Duke Devonshire.

4. Whatever powers are *reserved by the donor* (being part of the old dominion he had over his own estate) ought to receive a large

a large and *benign interpretation*. Arg. admitted. 10 Mod. 475. Pasch. 8 Geo. in Case of Coventry v. Coventry.

\*(A. 14) Where it is *well executed as to the manner*.

1. Regularly it is true, that where a man doth *less than the authority or commandment* made to him the act is void. Co. Litt. 258. a.

See (A. 18) pl. 2.  
2 Lev. 60.  
Trin. 24  
Car. 2. B.  
R. in Case  
of King v.

Melling. — But where he *does that* which he is authorized to do *and more*, it is good for what is warranted, and void for the rest; yet both these rules have diverse exceptions and limitations. Co. Litt. 258. a. — 2 Lev. 60.

2. In case of land settled with *proviso to limit any part for payment of debts* and legacies, preferment of servants, or other *reasonable consideration* as to him shall seem good; in such case a *demise for 1000 years* is not good, or a grant to a servant of 100l. per ann.; but a grant of 10l. per annum is good for his life, because it is reasonable, and not inconsistent with the advancement of his blood, according to the intent of the indenture. Cro. E. 34. Mich. 26 & 27 Eliz. B. R. Mildmay v. Standish.

3. Feoffment *to the use of his last will*; declaration *by deed* in writing that the feoffees shall stand seised so and so is not sufficient. Mo. 515, 516. Mich. 37 & 38 Eliz. cites Ld. Audley's Case.

4. Lands were devised to A. for life, remainder to B. for life, remainder to C. in fee, *with power to B. to make his wife a jointure*. Afterwards B. *covenanted to stand seised for the jointure of his wife, reciting his power*. 'Tho' this could not make a legal jointure, yet it was resolved to enure by virtue of his power. Quando non valet quod ago ut ago, valeat quantum valere potest; per Hale Ch. J. Vent. 228. in Case of King v. Melling. — cites Mich. 1651. B. R. Stapleton's Case.

Raym. 239.  
Hale Ch. J.  
cites it as  
Dame Haft-  
ing's Case  
— S. C.  
cited Arg.  
Wms's  
Rep. 166,  
167. — S. C.  
cited Skin.  
7.

So where the conveyance was made by tenant for life with such power *by lease and release*; Holt Ch. J. held at an assize that it was a good execution of the power. Arg. 10 M. d. 24. cites it as the Case of Gier and Offiter. — The words of the power were, that he might *appoint and settle a jointure*; and Holt Ch. J. held it a good jointure, and the rather because the word *settle* is a general word as to the manner of making the jointure. Wms's Rep. 165, 166. Arg. cites it as in 1706. Dyer v. Awfiter.

5. Power to charge lands with 2000l. a conveyance *by lease and release* to A. and his heirs *upon condition to be void upon payment of 160l. (as interest)* at the end of the first year, and 160l. per ann. for 9 years afterwards, with the 2000l. or of 2000l. and interest at the end of any year after the first year, was adjudged no good execution of the power. 1 Lev. 150. Mich. 16 Car. 2. B. R. in Scaccario. Jenkins v. Keymis.

Hale said,  
The power  
might have  
been better  
executed by  
grant of the  
debt, till  
2000l. be  
levied of the  
profits; or  
by declaration of use till 2000l. be rendered; or by deed charging the land with payment of 2000l. but doubt cannot be good by feoffment, or lease and release of the inheritance, till 2000l. and interest be paid. 1 Lev. 151. Jenkins v. Keymis. — Ch. Cases 101. Pasch. 21 Car. 2. S. C. — Ch. Rep. 275; S. C. — S. C. cited by the Master of the Rolls. Hill. 1731. and that Ld. K. Bridgman

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Bridgman held it to be only a common mortgage, and not binding on the issue, and so the money was lost; and his Honour inferr'd, that hence it appears that Courts of Equity are not free in extending powers given to tenant for life to bind a remainder-man. 2 Wms's Rep. 599. in *Case of Evelyn v. Evelyn*.

She may give it by will in extremities. *Crew Ch. J. Lat. 139. Daniel v. Upley.*

6. *Devise* to his wife for life, and power to dispose of the lands *to such of the children as she shall think fit*. She disposes of it thus, I dispose (reciting first the clause in the will) the same in manner following, i. e. I dispose it after my decease to my son P. and his heirs for ever. Adjudged by 3 J. contra to Vaughan Ch. J. that P. took a fee. Mod. 189. Mich. 26 Car. 2. C. B. *Liefe v. Saltingstone*.

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7. A power to *charge lands for portions* of younger children may be executed *in part, and extinct in part*, and stand good for the rest. But a purchaser shall defend himself in such case, tho' not executed according to the circumstances, but with this difference, that if he has notice he purchaseth at his own peril; per Finch K. Quere if he meant notice of the original conveyance only, or of the ill executed estate. Ch. Cases 264. Mich. 27 Car. 2. in *Case of Smith v. Ashton*.

1 Rep. 173. b. *Diggs's Case*.—

8. A power of *appointing a fee* may be executed at *several times*, viz. at one time to pass an estate for life, and the fee at another. Vern. 85. Mich. 1682. *Bovey v. Smith*.

So where an estate was devised to A. for life, *with power to make a jointure of 100l. a year for every 1000l. which any wife should bring as a marriage portion, and so for more &c. but not to exceed*. A. married M. with whom he received 800l. and settled 800l. a year; and afterwards he received 1500l. more, and made a further settlement of 150 l. a year. 2 Wms's Rep. 648. Mich. 1731. *Holt v. Holt*.

9. A. having 4 children, viz. 2 sons and 2 daughters, settles his estate on trustees, to the use of himself for life, remainder to his wife for life, and after their decease *to the use and uses of such child and children, and in such shares and proportions as he should appoint by any writing to be by him signed in the presence of 2 witnesses*, and in default of such appointment to his eldest son in tail. He by his will, by him signed, and attested by several witnesses, *devises a rent-charge* out of those lands to his youngest son for life, and to the first and other sons of his body successively in tail; and further wills, that in case his said son die without issue male, so as the estate should come to his eldest son, then he to pay 500l. a-piece to his daughters. The son dies without issue, the bill was brought by the daughters to have their 500l. a-piece according to the will. The defendant, who was the eldest son, by way of plea set forth the deed of settlement and power, prout, and insisted that the power was not well pursued nor executed by the will, (to wit) that the testator might have distributed the land amongst his younger children in what proportions he thought fit, but had not power to grant or devise a rent-charge, or sums of money, as he had taken upon him by his will to do. But the Court disallowed the plea, and ordered the defendant to answer the bill. 2 Vern. 80. Trin. 1688. *Thwaytes v. Dye*.

10. *Devise*

10. Devise to the wife for life, and then to be at her disposal to some one of his the testator's children. He left a son and a daughter; the wife married again, and she [and her husband] by lease, release and fine, covenanted to stand seised to the use of herself for life, without impeachment of waste, remainder to the daughter in tail, [remainder to the son and his heirs]. The power was held to be well executed. And the words (without impeachment of waste) is void and surplusage, because it exceeds the power. 10 Mod. 31. 71. Trin. and Mich. 10 Ann. B. R. Thomlinson v. Dighton.

1 Salk. 239. Palch. 10 Annæ B. R. S. C. stated as in the addition. — Wms's Rep. 149, to 171. Trin. 1711. S. C. stated as in Salk.; only Salk.

seems to be misprinted in the word (her) for (his) children; and the conveyance by lease and release was held to be an effectual, though an improper execution of the power, and so a judgment in C. B. was affirmed.

11. A. had a power to raise 7000l. for younger children by deed or will executed in the presence of 3 witnesses; afterwards, by will executed in the presence of two witnesses, he charged the premises with 8000l. for his younger children, and it was decreed good for the 7000l. G. Equ. R. 168. cites 13 June 1714. Parker v. Parker.

[But quære if a third person was not present, though he did not subscribe as a witness; for I think

I remember such circumstance mentioned somewhere.] — M. a feme before marriage, with consent of her after baron, conveyed her estate to trustees to such uses, and for such estates as she should by deed or will, or by any writing in nature of a will appoint. Ld. C. Macclesfield much doubted if a will not duly executed pursuant to the statute of frauds, but by two witnesses only, would be a good appointment; because in such case being by will, it must be intended such a will as is proper for the disposition of land, and consequently should be subscribed by three witnesses, in presence of testatrix; for this is within all the inconveniences intended to be prevented by the statute of frauds, and the other words (in the nature of a will) mean the same as a will. Wms's Rep. 740. Mich. 1721. Longford v. Eyre. [ 480 ]

12. A. tenant for life, remainder in tail to B. eldest son of A. \* (A. 17). join'd in a settlement on B.'s marriage [\* without suffering any common recovery. See Barn. Chan. Rep. 110.], by which part of the lands were to be to the use of A. for life, and the other part to B. remainder in the whole to the first and every other son of B. in tail. Provided always, that if M. the wife of A. should die, and A. marry any other wife, then, and so often, A. may settle so much of the said premises as shall be of the yearly value of 600l. for a jointure and provision of such wife during her natural life. M. died. A. intermarried with J. and previous to the marriage, in consideration thereof, and of 2000l. portion, conveyed to trustees and their heirs all the lands in the first deed, to hold during the life of J. upon trust, out of the rents and profits to raise 100l. a year for the separate use of J. during the coverture, and after A.'s decease to raise 300l. a-year for J. during her life for a jointure. † (A. 16). And † upon this further trust, to permit the owner of the premises to receive the residue of the profits. After the marriage A. made a third deed of the same premises, and to the same trustees in like manner during the life of J. to secure her another annuity of 300l. a-year. Afterwards A. made a fourth deed reciting the three former deeds, whereby the premises were limited in trust to raise 100l. a year for the separate use of J. during the coverture, and an annuity of 600l. a year after A.'s decease for her life, by way of jointure; and declared,

cites 2 Salk. 538. Killmurry v. Dr. Gery.—But 2 Salk. 538. has no state of the Case, and reports it, Pasch. 12 Annæ.

2 Vern. 5. A. by will gives his personal estate to such uses as his wife  
723. S. C. shall direct with consent of his trustees; a disposition by his wife  
by name of is not good. Chan. Prec. 452. Mich. 1716. Symphon v.  
Hutton v. Hornsby.  
Simpson.

See (A. 14)  
in pl. 12.—  
Portions (1)  
pl. 13.

(A. 16) *Suspended, determined or extinguished.*

1 Rep. 111.  
cites 15 H.  
7. 1.

1. *Collateral powers are not destroyed by feoffment &c. as power for executors or trustees to sell to J. S. and they enfeoff J. D. yet they may sell to J. S. 2 Lev. 60. Arg. cites 15 H. 7.*  
2. A deed not pursuant to the power of revocation is of no force to make an interruption of the power of revocation. Chan. R. 114. 13 Car. 1. Robsart v. Turton.

Lev. 105.  
S. C.

3. Power to charge lands with 2000 l. is not destroyed by a mortgage by lease and release, but otherwise had it been by *fine or feoffment*. Ch. Cases 105. Pasch. 20 Car. 2. Jenkins v. Kemis.

2 Lev. 61.  
S. C.

4. A. is tenant in tail with power to make jointure; he suffers a recovery. This is an extinguishment of the power. Vent. 226. Mich. 24 Car. 2. B. R. King v. Melling.

And there are two sorts of powers; one annexed to the estate, as a power to make leases &c. which is destroyed by parting with the estate; another which may be termed collateral to the estate, as this power of charging it with money; and this last A. would have, tho' he had survived the term of 99 years; for still he might have charged the premises therewith, and so might he have done, tho' he had assigned over the term; per Ld. C. Macclesfield. Ibid. 778.

5. A. by settlement was tenant for 99 years if he so long live, remainder to trustees during the life of A. remainder over, with a power to charge the lands with money. A. and the trustees and the remainder-man in tail, all join in a common recovery, and declare new uses thereof, viz. to the use of A. for life, remainder over. Ld. C. Macclesfield held, that this joining of A. without reserving a power to charge the premises with the said money, has destroyed that power which A. had, and otherwise he might defeat his own grant. Hill. 1721. Wms's Rep. 777. Savil v. Blacket.

6. If a power reserved over a legal estate is executed defectively at first, such power may be executed over again, and the last execution shall stand, the first being a mere nullity. Per Ld. Chancellor. Barn. Chan. Rep. 111. Pasch. 1740. in Case of Harvey v. Harvey.

Ibid. 111.  
says that in the deed it was declared by A. that the provision thereby made for his wife, was to be in

7. A had power to settle so much as should be of the yearly value of 600 l. a year out of an estate of 900 l. a year, the other 300 l. a year having been settled before by the same deed on B. his son). A. upon his marriage with M. charged the estate with 100 l. a year payable to M. during the coverture, and afterwards to raise 300 l. a year for her jointure: and on this further trust to permit the owner of the premises to receive the residue.

*Jdae.* It was urged, that this was allotting the profits over to another purpose, and that A. cannot undo what was done by that clause. But Ld. Chancellor contra, and that those words are no more than what law and equity would have said without them: that it is not said that B. was to have any particular benefit from this, and he was to have no more benefit thence than any other remainder-man. Barn. Chan. Rep. 112. Pasch. 1740. *Harvey v. Harvey.*

*recompence for her jointure, and in full bar of her dower, and that thence it was infer'd that that amounted to a release by A. in*

favour of B. that he would not make any other settlement of this estate in favour of his wife: But Ld. Chancellor said, that those words are only the common form inserted in marriage settlements, and therefore from those words there cannot be drawn any inference of that sort.—*Ibid.* 112. He said, that an objection had likewise been drawn to the same purpose from the whole estate of pool. a year over which the power could be exercised, being vested in trustees, but that no inference of this kind could be drawn from that neither.

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(A. 17) *Defective Execution. Supplied in Equity.* See (A. 14) in pl. 12.

1. A Jointure was decreed where the power was not pursued; yet *part only of the jointure depended on the question.* Chan. Cases 264. in Case of *SMITH v. ASHTON*, cités 17 June 8 Car. \* *Countess of Oxford's Case.*

As where it was mistaken or mis-cited. Toth. 229. cités Trin. 8.

\* Car. *Countess of Oxford v. Stanhope.*—A power mistaken was made good to the *lessee.* Toth. 229. cités 20 June 16 Jac. Orrel v. Leeke.

\* S. C. cited by Ld. Chancellor, who said, he had indeed directed that decree to be searched for, but it could not be found. Bara. Chan. Rep. 113. in Case of *Harvey v. Harvey.*

2. A defective execution of a power raised by a *voluntary conveyance* is without help in equity. Chan. Cases 160. Pasch. 22 Car. 2. *Wilmer v. Kendrick.*

*Provision or no provision is fit to be regarded in voluntary*

conveyances for the benefit of younger children &c. but never in conveyances founded on a *valuable consideration.* Arg. 10 Mod. 487. Pasch. 8 Geo. in Case of *Coventry v. Coventry.*

3. A. by marriage settlement reserves a *power by any writing under his hand and seal* to charge lands for payment of 500l. for daughters portions. He prepared *notes* in writing, which he declared should be the effect of his last will, and *sent them to counsel* to draw up his last will in form by; but before the blanks left by the council in his draught were filled up, and before any *execution* of it by A. he died. Decreed, for the daughters, tho' it was neither a deed, nor any trustees named nor executed. Fin. R. 273. \* *Smith v. Ashton.*—S. C. cited per Ld. Rawlinson. 2 Vern. 164.

\* S. C. Chan. Cases 213. Mich. 27 Car. 2. and says, The deed in which this power was, was a voluntary one, the consideration was natural affection, and in

the execution of this power the circumstance of a *seal was wanting*; yet this defect was aided; for *circumstances are but cautions to prevent impositions*, the substantial part is to do the thing, and therefore when it is clear and indubitable that the thing was designed to be done, the neglect of circumstances shall not avoid the act in equity; and the rather because such powers are not like conditions strictly to be expounded, but favourably to be construed for the benefit of children devisees; and yet a purchaser might defend himself against such a power not well executed, especially if he had no notice of it at the time of the purchase made.

But this was after an issue at law, whether such notes in writing were part of the last will of Ashton, and being found by the verdict to be his will, and in favour of younger children thus provided for, the Court decreed the power well executed. *Ibid.* 265.

S. C. cited Arg. 10 Mod. 467, 472, 477, 478.—S. P. 2 Vern. 104. Trin. 1690. in Case of *Bradley v. Bradley.*—S. P. 2 Chan. Rep. 71. in Case of a Purchaser. 24 Car. 2. *Thorn v. Newman.*

Circumstances in such cases are only put into such powers, to the end that no fraud or

should

should be imposed. 2 Chan. Cases 30. Pasch. 32 Car. 2. in Case of Hale v. Hale. — Citat<sup>d</sup> Earl of Oxford's Case.

4. Bill to supply a defective execution of a power to make leases &c. Defendant pleaded a judgment on a special verdict at law, that the leases were void, and that the Court of C. B. after several arguments at the bar thereupon delivered their opinion accordingly. The plea was allow'd and the bill dismissed with 5l. costs. Fin. R. 275. Hill. 29 Car. 2. Temple v. Baltinglass.

3. C. cited Arg. 10 Mod. 47b. Pasch. 8 Geo. 1. in Canc. in Case of Lady Coventry v. Ld Coventry.

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5. A. was made tenant for life by marriage settlement of several manors and lands in Ireland, with power to make a jointure not exceeding 1000l. a year. Pursuant thereunto a settlement was made, and a particular of lands mentioned and set out for the jointure, and which in the particular given him were computed at 1000l. a year, but in truth fell short, and were not above 600l. a year. It was insisted for the defendant, that he claimed under the marriage settlement as a purchaser, and that A. had only a power to have charged with a 1000l. a year; and if he had not done it at all, but had died without executing this power, a Court of Equity could not have done it for him, and so have raised a jointure of 1000l. a year upon the estate, tho' it had been reasonable and just for him to have done it in his life-time. But the Court decreed the jointure to be made up 1000l. a year against the issue in tail, who was not privy to the marriage treaty, nor guilty of any fraud. 2 Vern. 379. Trin. 1700. Lady Clifford v. E. of Burlington.

Abr. Equ. Cases 222. pl. 9. Hill. 1701. S. C. but differing somewhat in the state of it, yet decreed as here notwithstanding A's being averse (as there mentioned) to his son's marrying her, and

6. A. seised of an estate in Y. and D. settled it to the use of his son B. for life, remainder over, with power to B. to limit any part not exceeding 100l. a year for a jointure for any wife he should marry. The lands in D. being 180l. a year, and charged with 100l. a year to A's widow for life, B. limited the 100l. out of the same estate (which being charged with 100l. a year before was not of value sufficient), and covenanted in the deed, that if the value should be defective, it should be made up out of the other estate. B. being dead, his widow brought a bill to have it supplied out of the estate in Y. And it was decreed accordingly, tho' B. was only tenant for life. 2 Freem. Rep. 256. pl. 323. Trin. 1702. Fothergill v. Fothergill.

having no intention his son should provide for her, and notwithstanding her neglect in not requesting during the coverture to make the defect good; for the laches of a feme cannot be imputed to her.

\* Chan. Cases 264. S. P. in Case of Smith v. Ashton. — So where a feme covert was impowered to declare uses by

7. A. having power to charge lands for younger children by a writing under his hand, attested by three witnesses, with 7000l. did (in \* fear of sudden death, and being absent from home, and so not being able to have a sight of the deed where this power was contained) by a paper attested by two witnesses, charge his estate with 8000l. instead of 7000l. for his children, and this defect was supply'd. See G. Equ. R. 168. Pasch. 8 Geo. & 10 Mod. 467. where this is cited as the Case of Parker v. Parker.

any writing or last will attested by three witnesses, and the while a feme covert appointed the premises by will to her daughter; and after her husband dying, she, on marriage of a second husband,

by deed attested by two witnesses, agreed and covenanted to surrender the premises (being copyhold) to the use of her intended husband. *Ld. C. King* said; that the articles being for a valuable consideration, viz. that of marriage, he would supply the want of circumstances, but not if they had been voluntary. 2 Wms's Rep. 623. Trin. 1731. *Cotter v. Laver*.

8. A power was given to baron, tenant for life, to make a jointure on his wife by deed under his hand and seal. He having a wife, for whom he had made no provision, by his last will under his hand and seal, devised part of the lands within his power to his wife for her life. The Master of the Rolls held this a good provision, and decreed the trustees who had the legal estate to convey to her an estate for life. *Mich. 1728. 2 Wms's Rep. 489. Tollet v. Tollet*.

9. A power was reserved for the husband at any time during the joint lives of him and M. his wife, by his last will, or any writing purporting to be his last will under his hand and seal attested by three or more credible witnesses, to charge the premises with any sum or sums not exceeding 2000 l. to be paid to such persons and in such proportions as he should think fit. The husband by his last will attested by three witnesses, but not sealed, reciting his power, disposed of the 2000 l. Nor did the testator sign the will in the presence of three witnesses, but only acknowledged it was his hand, and declared it to be his will, and the three witnesses subscribed their names in testator's presence. *Ld. C. King* said, that tho' himself inclined to think the will good in respect of the acknowledgment and subscription, yet that point should be reserved to the defendant; and also that he took the will to be good, and so a good charge. But upon a reference to the Judges of B. they determined upon argument, as to the first point, that the will was void as a charge for want of being sealed. *Hill. 1728. 2 Wms's Rep. 506. Dormer v. Thurland*. [ 485 ]

10. In aiding defective executions of deeds in favour of a wife or children it never was required that they be founded on a valuable consideration in the strict sense of the word, but the deed's being in order to make a provision for a wife or children has been thought sufficient; and as this was the general doctrine, so, was it not for the prior deeds that have been in the present case [which see at (A. 14) to avoid the repetition of the state of it here], it is one of the strongest that can come before this Court for relief; because for want of a common recovery to dock the entail under the original settlement in 1679, the widow the plaintiff could have no title at law to have the benefit of a jointure, and so was absolutely forced to come into Chancery for relief; and where that is the case, that the whole estate, over which the power is executed, is merely an equitable estate, the being an absolute voluntier is no objection to the party's having the assistance of this Court to supply the defect of a deed; for its being merely an equitable estate obliges this Court to make a determination concerning it. And in such case, the being a mere voluntier is no objection to the having a defective execution of a power supplied, which is exercised over such equitable estate; per *Ld. Chancellor. Barn. Ch. Rep. 110, 111. Pasch. 1740. upon a re-hearing of the cause of Harvey v. Harvey*.

11. *A wife or a child who comes into equity to have the benefit of a defective execution of a power, or a defective provision for them need not be a wife or child totally unprovided for.* In Cases on this subject it has been rightly said by the Court, that the husband or father are the *proper judges whether they are sufficiently provided for or not*; and the Court will not examine whether the provision made was suitable or not, but will leave it to the husband or father to judge whether they shall be sufficiently provided for or not. And was the Court to enter into an inquiry of that sort, it must examine into such circumstances of families not fit for them to do. If the father or husband has said, that they are not sufficiently provided for, and has considered them as such, the Court has considered them in the like manner; but indeed it has considered whether totally unprovided for, or left in a condition not fit for their state or quality, and has relieved where a sufficient provision has not been made, but never by reason of the *excess of provision*. Per Ld. Chancellor. Barn. Chan. Rep. 113. Pasch. 1740. Harvey v. Harvey.

(A. 18) Decreed to be executed *pursuant to an Agreement.*

*A tenant for life, remainder to his first and other sons in tail, remainder to B. for life, remainder to his first and other sons in tail, remainder to C. with a power for B. after the death of A. without issue to make a jointure.*

*B. marries in the life of A.*

[ 486 ]

Note, The covenant in this case was looked upon as an execution of the appointment in pursuance

1. **T**ENANT for life by will with power to make a jointure covenants to make a jointure on A. his wife of 300 l. per annum; her fortune which he received being 3000 l. In about three quarters of a year after marriage the husband dies, the jointure not being made. Ld. Chancellor inclined strongly for the plaintiff in regard of the consideration, and because the tenant for life by the will had power to have done it; and was express, that if he had de facto done it, and failed in time or other circumstance to have done it well, the defect should have been supply'd; for circumstances in such cases are only put into such powers to the end that no fraud or falsehood should be imposed, and cited the case of the COUNTESS OF OXFORD, so decreed by the Ld. Elsmere, and another Case. 2 Chan. Cases 30. Pasch. 32 Car. 2. Elliot and Hele v. Hele.

*B. marries in the life of A. and before marriage covenants to make a jointure, and to execute this power when he should come into possession. A. dies without issue male, and B. survives, but dies without making a jointure, or executing this power. The widow of B. brought a bill against C. to have a jointure made; because B. surviving A. he might have executed this power, and had covenanted so to do; and it was decreed accordingly. G. Equ. R. 167. cites it as decreed at the Rolls 1709. in Case of Allord v. Allord.—S. C. cited Arg. 2 Wms's Rep. 231. Pasch. 1724. in Case of Lady Coventry v. Ld. Coventry.*

2. In a marriage settlement was a proviso that the baron by deed or will might limit any of the lands (except those in jointure) to such person and for such estates as he should think fit for raising 500 l. a-piece for younger children, to be paid at such times and in such manner as he by deed or will should declare, and covenanted to do so accordingly. The baron died leaving several younger children of the marriage, but made no appointment.

Two

Tho' some lands not settled in jointure were limited to the baron for life, and after to the *issue male of his own body* with remainders over, yet it was decreed that it was a charge on the land, and bound the issue in tail, and ordered the 500 l. to be raised for each of the younger children immediately. G. Equ. R. 166. Pasch. 8 Geo. 1. cites Dr. Sarrth v. Lady Blanford, 1695.

3. A *devised* land to B. for life, with several remainders over, with a power for the person in possession to limit any part for a jointure not exceeding a moiety. B. whilst an infant marries M. and with his mother enters into articles to settle lands of 100 l. a year on M. the plaintiff for her jointure, but in the articles *no notice was taken of the power*, and before any settlement made pursuant to this power, B. dies. M. brought a bill against the remainder-man to have the jointure made good, and decreed accordingly. G. Equ. R. 167. Pasch. 8 Geo. 1. cites it to have been decreed per Ld. Cowper 1708, in Case of Holinshead v. Holinshead.

S. C. cited Arg. 2. Wms's Rep. 229. in Case of Lady Coventry. v Ld Coventry. This case was said by the Master of the Rolls to be an idle case and not law, at the Rolls, 21

March 1738. in Case of Colton v. Hoskins.

4. A. tenant for life, with power to make a jointure of 500 l. per ann. out of certain lands, covenants upon marriage for himself and his heirs, that he or his heirs would in pursuance of this power, or otherwise, settle 500 l. a year. After the marriage he directs a settlement to be drawn of such lands as were comprised within the power, but dies before it is executed. It was questioned, whether the remainder-man should be bound by this intended conveyance, or whether the wife should have satisfaction made her out of the personal estate? But Parker C. being assisted by Judges, decreed upon a second hearing, that the lands should be settled 10 Mod. 463. Pasch. 8 Geo. Lady Coventry v. Ld. Coventry.

G. Equ. R. 166. Pasch. 8 Geo. S. C.—Max. in Equ. at the end. S. C.—9 Mod. 12. S. C. Mich. 9 Geo.—S. C. argued. 2 Wms's Rep. 222. and reported to be so decreed.—

S. C. cited per Cur. Hill. 1731. Ld C. King, being assisted by J.d. Ch. J. Raymond, and the Master of the Rolls, that though this depended only on a covenant, yet the jointure being the chief thing in view, the decree was, that the land should be settled, and the covenant not made good out of the personal estate. Wms's Rep. 597. in Case of Evelyn v. Evelyn.

S. C. cited by Ld. C. King, and said it being adjudged upon solemn debate with assistance of Judges is a great authority, and to be observed by him, and that from thence it may be inferred, that whatever is in the power of the person covenanting to do, provided the covenant be for a valuable consideration, equity ought to look upon as done, and supply the want of circumstances against a remainder-man. 2 Wms's Rep. 625. Trin. 1731. in Case of Cotter v. Layer.

## (A. 19) Where a bad Execution may operate as a good Appointment.

1. THAT shall not make a good appointment which was intended to pass an interest. Arg. Hill. 1655. Hard. 48. cites 6 Rep. Sir M. Finch's Case, and Co. Litt. 301. 302. that a conveyance shall not enure to a contrary end than it was design'd for.—But held that the grant of an office by a lease which was not good amounted to a good appointment. Ibid. 49. Jones v. Clerk.

Q. 13

2. What

S. P. per  
Holt Ch. J.  
3 Ch. R.  
128. cites  
6 Rep.

2. What is void as a will or deed may be a good appointment or execution of a power; per Holt Ch. J. 2 Vern. 543. Pasch. 1706. cites Hob. 312. Kibbet v. Lee.

\* 176. Sir Edward Cleer's Case. — \* It should be 17. b. — A bad will shall amount to an appointment by 43 Eliz. Arg. Hill. 1655. Hard. 48. cites Hob. COLLISON's Case, but says that that is by the help of an act of parliament.

3. A. devises lands to B. his son for life, and then devises *such part of the said lands as his said son shall appoint, to such wife as the son shall marry for her life for the jointure of such wife*, with contingent remainders to the first and every other son of the eldest son in tail, remainder over. B. conveys to trustees and their heirs part of the said lands to the use of himself for life, then to his intended wife for life, and after to the use of the heirs male of her body; and dies. Per Eyre Ch. J. This power to B. is not to limit the estate, but to appoint the land, so that he is only to ascertain her estate in what part of the land he will, and her estate is settled by the will, so that this cannot take effect as a conveyance, but it may as an appointment of the land which she shall have. And tho' it had limited an inferior interest, yet she should have an estate for her life. And per Denton J. If this were considered as an execution it would not be good as it exceeds the power, but it is only an appointment of the lands; and her estate takes effect by the will and not by the deed. Fortescue J. doubted, if the son had barely appointed the land without limiting any estate, whether it would be good? Judgment for the plaintiff, Gibb. 156. Mich. 4 Geo. 2. C. B. Peters v. Mafham.

### (A. 20) Powers in general. Construction thereof, and of the Execution thereof.

For when one has an authority, and does an act which can be good neither way but by virtue and in pursuance of that authority, it shall rather be understood so have been by force of his authority than void; though in doing the act he takes no notice of his authority.

1. C. Was seized in fee of 3 acres of land in capite of equal value, and made a feoffment in fee of two of them to the use of his wife for life for her jointure, and of the third acre to the use of such person and persons, and of such estate and estates as he should devise by his last will; and after by his will devises the said third acre without any notice taken of his power reserved upon the feoffment. Now if they had been three acres of land in socage, and he had made such a feoffment, and after devised the third acre without reference to his power, it had passed by the will, because then it might either pass by virtue of his interest by the will, or his authority by the feoffment; but being capite lands, which could not pass but by the authority, because he had passed two parts by act executed; this devise was construed to be an execution of his authority, because otherwise the devise had been to no purpose. 12 Mod. 469. Pasch. 13 W. 3. in Case of Parker v. Kett. — cites 6 Rep. Clere's Case.

12 Mod. 469. in Case of Parker v. Kett. — But where one has an interest and an authority together,

together, and he does an act *generally*, it shall be construed in relation to his interest, and not to his authority. 12 Mod. 469.

\* (B) Of Revocation, what shall be a good Power.

[1. IF a man makes feoffment to the use of J. S. for life, with divers remainders over, with power of revocation of the estate for life only, and that then another shall have this estate, and that the remainder shall stand, it seems this is a good power. Dubitatur. M. 8 Ja. B. between Thompson and Freston.]

[2. If a man suffers a recovery, and limits the uses by indenture, with power of revocation, and to limit new uses, and after by indenture he revokes and limits new uses, with like power of revocation and to limit new uses; this second power of revocation and new limitation of uses is good; for all arises out of the recovery which is the foundation. P. 10 Ja. Scaccario among the reports of B. Beckett's Case per Curiam preter Snigg.]

Lane 118.  
Pasch. 9  
Jac. in the  
Exchequer,  
S. C. mentions a third  
indenture of  
revocation  
and limita-  
tion; and

Bromley and Altham barons held, that the declaration of the uses made by the indenture was good, and he having power by the first to declare new uses, may declare them with power of revocation; for it is not merely a power, but conjoined with an interest, and therefore may be executed with a power of revocation; and then when he by the third indenture revokes the former uses, now it is as if no uses had been declared, and then he may declare uses at any time after the fine, as it appears by 4 Mar. Dyer 136. and Coke lib. 9. Downham's Case, and in this case they did rely upon Brocks's Case, Cooke, lib. 1. where it is said, that upon such a power he can revoke but once for that part, unless he had a new power of revocation of uses newly to be limited, whereby it is implied, that if he had a new power to appoint new uses, he may revoke them also. Snig baron to the contrary, and said, that he had not power to declare three several uses by the first contract, which ought to authorise all the declarations upon that fine, and then the revocation by the third indenture is good, and the limitation void. And also he said, that such an indenture to declare uses upon uses, was never made, and it would be mischievous to declare infinite uses upon uses. Tanfield held, that the uses upon the second indenture stand unrevoked, and the new uses in the third indenture are void. The power in the second indenture is, that he may revoke and limit new uses, and that the fine shall be to those new uses, and no others; and then if there be a revocation, and no punctual limitation, he had not pursued his authority, for he ought to revoke and limit, and he cannot do the one without the other; also he said, that after such revocation and limitation, the fine shall be to such new uses and no other, so that if there be no new uses well limited in the third indenture, the former uses shall stand void.

Ibid. 119. There is a Nota [of the Reporter, that] it seems, that if a man make a feoffment and declare uses, and reserves a power to revoke them, without saying more, he cannot revoke them and limit new; for the use of the fine being once declared by the indenture, no other use can be averred or declared which is not warranted thereby, for he cannot declare the fine to be to new uses, when it was once declared before, Cook. lib. 2. 76. That no other use can be averred, than that in the conveyance, Cooke lib. 9. 10, 11. although that the first uses are determined, as if a man declare the use of a fine to be to one and his heirs, upon condition that he shall pay 40l. &c. or until he do such an act, if the first use be determined, the fine cannot be otherwise declared to be to new uses; and therefore it seems, that all the uses, which shall arise out of the fine, ought to spring from the first indenture, which testifies the certain intention of the parties in the limiting thereof, and then in the case above, the second indenture and the new uses thereby, are well warranted by the first indenture, and in respect that this is not a naked power only I conceive that they may be upon condition, or upon a power of revocation to determine them; but the power to limit the third uses by a third indenture, after revocation of the second uses in the second indenture has not any warrant from the first indenture, and without such warrant, there can be no declaration of such new uses, which were not declared or authorised by the first indenture, which note, for it seems to be good law.—S. C. cited Vent. 198, in Case of Sir S. Jones v. Lady Manchester.

[3. If uses are limited by an indenture of certain land, and there is a power of revocation, and to limit new uses in this manner, It was found that he made a lease for

years, and the next day granted the reversion in fee, to which the lessee attorned; whereupon

[viz.] *And if the said A. B. shall make any estate in fee simple or fee tail, then the use shall be &c.* Tho' it is not limited to be made of the land in the indenture, yet it shall be intended, and therefore the power good. Tr. 13 Car. B. R. between *Snape* and *Turton*, adjudged per Curiam upon a special verdict. Intratur. Tr. 11 Car. Rot. 1137.

it was resolved, that altho' there be but one intire estate in fee conveyed, yet both being found, and that it was with an intent to make a fee to pass, that this was a revocation within the proviso, [ 489 ] Cro. Car. 472. S. C.—The grant of the reversion is a good revocation, notwithstanding the lessee for years attorned, and this shall enure not as an actual grant of the reversion at the common law, but as a declaration of a new use by virtue of the proviso, which determines the former uses. Jo. 393. S. C.

4. A. made a voluntary lease for 99 years in trust for raising 6000*l.* for his children, with a power to revoke with consent of his lady, and three more of her friends. Afterwards having occasion for money, he prevailed with her and the others to consent to a revocation so far as to charge it with 2000*l.* which he borrowed of H. and then to be subject to the first charge. She died. This being settled upon her for a jointure, the jointure settlement took notice of this power and the revocation, and the mortgage to H. but it did not appear either by the mortgage to H. or by the jointure deed, whether this revocation was total or not. Ld. Chancellor held, that this settlement should not be held fraudulent within the statute of 27 Eliz. because it was not an absolute power in A. but he must have the consent of his lady and the other three. And it cannot be supposed that they would consent but upon very good grounds, and therefore not fraudulent. But if a man reserves a power to revoke, with consent of J. S. who is his own relation, or one that may be supposed to be at his command, it will be fraudulent within the statute. 2 Freem. Rep. 8. Mich. 1676. Ld. Banbury's Case.

5. A. on his marriage with B. conveys land to C. in trust for himself for life, remainder to B. for life, remainder to the heirs of their two bodies, remainder to A. in fee, proviso that in default of issue of the marriage C. shall convey to such uses as the survivor shall appoint. A. devised the land to D. and dies without issue. Per l d. Wright, Ld. Dyer's scintilla juris remains in C. and tho' the proviso be unskillfully penn'd, yet it amounts to a power of revoking and limiting new uses. 2 Vern. 377. Trin. 1700. Bishop of Oxon v. Leighton & al.

6. 10 Ann. cap. 23. s. 1. enacts, That all estates made to any person in any fraudulent manner, on purpose to qualify him to give his vote at elections of knights of the shire (subject to agreements to defeat such estate or to reconvey the same), shall be, against those who executed the same, free and absolute, and all securities or agreements for the redeeming or defeating such estates, or the re-conveying thereof, shall be void.

(C) What shall be a good Revocation according to the Power.

[1. IF A. covenants by indenture to stand seised to the use of him and B. his wife, and of C. his daughter for their lives, and after to the use of C. in tail, with remainder over, with proviso that if A. after certain debts paid, \* shall be disposed or shall determine to disannul, exchange, alter, diminish, or make void the uses or estates of any of them, of the premises or any part thereof, that then it shall be lawful to and for the said Nicholas at all times at his pleasure by his writing &c. to determine, disannul &c. and also by the same writing at his will and pleasure, or any other writing whatsoever signed &c. to limit, declare, and appoint the uses of the same to the persons aforesaid, or to any other persons &c. and after B. dies; and after A. takes E. to wife, and the debts being paid A. covenants to stand seised of the same tenement, to the use of himself and E. for their lives, and after to the use of the right heirs of himself: Tho' here is not any express signification of his purpose, or determination to determine, disannul &c. yet by this last covenant to stand seised to other uses he declares his purpose and determination to determine, disannul &c. and by this *ipso facto* the first uses cease, and the covenant in the same last indenture enures to raise new uses to A. and E. his wife, and to the heirs of A. Because non refert an quis intentionem suam declarat verbis an rebus ipsis vel factis; for when he limits new and other uses, he by this signifies his purpose to determine and alter the uses before. Co. 10. *Scroop's Case* 143. b. Resolved by the 2 Chief Justices and Chief Baron in the Court of Wards, and there fol. 144. says, that it was so resolved in B. R. Tr. 2 Ja. between Frampton and Frampton.]

[2. If a feoffment he made to the use of A. for life, with diverse remainders over, with a power to A. to revoke the uses, and to limit new uses in fee or in tail, and after A. bargains and sells the land to B. for a month, and after grants the reversion in fee to C. and B. attorns to it; this is a good revocation and limitation of new uses according to the power; for the making of the lease for a \* month is not any suspension of the power as to the fee; for † he may revoke by parts, as he may limit an estate for years, and it is good for the said term, and after limit it in fee to another, but this shall not revoke the lease for years before made; for then he shall defeat it by his own act. Also in this case this lease for a month and grant of the reversion, being a common assurance, shall be taken as one act. Tr. 13 Car. B. R. adjudged upon a special verdict, per tot. Curiam, between ‡ *Snape and Turton*. Intratur. Tr. 11 Car. Rot. 1137. And the Court vouch'd *Dame Russell's Case* to be according to this judgment, which was between *Wood and Reynolds*. But the Court said, that if he who has such power to revoke and limit new uses, makes a lease for life, this suspends his power as

S. C. cited  
10. 393.—  
S. C. cited  
by Jones J.  
\* Fol. 263.  
Winch. 83.  
— S. C.  
cited Hob.  
312, and  
313. in Case  
of Kibbet v.  
Lee.—  
S. C. cited  
1 Keb. 537.  
Mich. 27  
Car. 2. B. R.  
in Case of  
Wigon v.  
Garret.

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6 Rep. 33. b.

\* Orig (Ans)  
Mo. 612,  
783.—  
† Provided  
if he shall be  
minded to  
alter or re-  
voke any of  
the uses, to  
the intent  
to alienate  
any part or  
parcel of the  
premises,  
and declare  
his intent  
&c he may  
revoke for  
part at one  
time, and for  
part at an-  
other. And.  
67. Sir  
Richard  
Lee's Case.

—Mo. 604, *to the fee*. And so a diversity between lease for years and for 605. Digges's life, or estate of franktenement.]

Cafe. —

Mo. 618.

Bullock v. Standen. S. P. — † Jo. 392. S. C. — Cro. C. 472. S. C. — Mod. 114. cites S. C. — Wms's Rep. 164. cites S. C.

Mo. 567.

Parker v.

Clere. S. P.

Resolved. —

Mo. 611.

3. Power reserved by deed in his life, or by his last will in writing, to alter, revoke, or determine the uses and limit new uses. He *devises the land to his wife for life* and dies, this enures as limitation of the use of the estate executed by the fine. Mo. 518, 519. 35 Eliz. cites the Case of Thomas v. Gwin.

4. Where a power is to revoke on the tender of money, at a place certain, in such case, if no notice of the time be given to the bargainee, a tender at the place, the bargainee not being there, is no revocation, Mo. 602, 42 Eliz. in Canc. in Burgh's Cafe.

5. Power to revoke after such a day; conveyance to a purchaser is a revocation, tho' made before the day, by the Stat. 27 Eliz. 4. Mo. 618. Pasch. 42 Eliz. C. B. Bullock v. Thorn.

6. Conveyance by covenant to stand seised for consanguinity is not such a conveyance for valuable consideration, as to make void a former conveyance containing power of revocation by 27 Eliz. 4. Mo. 602. Trin. 42 Eliz. in Canc. Lady Burgh's Cafe.

Cro. E. 856.

Mich. 43 &

44 Eliz.

C. B. S. C.

that it is

but an au-

thority to

revoke, and

is to be done

by the assent

of the four,

and so is determined by death of one.

7. A. makes *seoffment* to four to certain uses, with power of revocation on tender of 3s. for a *reasonable cause to be shewn by him and approved of by them*. One dies. A tender to the survivors; and their approbation is not sufficient to revoke &c. For *approbation* was a thing of consent, which cannot survive &c. cites D. 189. But per Popham it had been otherwise if A. had limited the tender only to be made to two, Noy. 38. Allwaters v. Bird.

[ 491 ]

S. P. per

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Vern. 69, 70. Trin. 1683. Arundel v. Phillpott.

8. A. suffer'd a recovery to the use of himself and M. his wife for life, remainder to B. *Provided that A. and his wife by their joint deed &c. might revoke, alter &c. and that thenceforth the recovery should be to the new uses. A. and M. by deed declared, that it was their intent to revoke, alter, or avoid &c. all the former uses to B. and thereupon without more words limited new uses.* The questions were, 1st, If the power being by words copulative be pursued, the revocation &c. being by *disjunctive words*? 2. If by saying it was their *intent* to alter \* &c. without saying positively that they did alter &c. be a good revocation by implication? 3. If by the *same deed* the old uses may be revok'd and new uses limited upon a recovery without more? After several arguments, it was adjudged a good revocation of the old uses, and a good limitation of new uses. Mo. 681, 682. pl. 936. Hill. 45 Eliz. Fitzwilliams's Cafe.

9. A power was to revoke by writing under hand and seal, and delivered in presence of three witnesses, and thenceforth the uses to cease. A revocation by will is good, if all circumstances are comply'd with. Hob, 312. Kibbet v. Lee.

A settlement was made with power of revocation by will in writing.

executed in the presence of three witnesses. The will was made in the presence of three, but one did not subscribe his name; yet it was decreed a sufficient revocation, and in strictness it was an execution. 2 Chan. Rep. 212. 32 Car. 2. Sale v. Freeland.—For this was a power to dispose of his own estate, which is to have all the favour imaginable. But where a power is to charge a third person's estate, such power is to have a rigid construction. 2 Vent. 350. S C. Hill. 32 Car. 2. See (A. 14) pl. 11. the quere in margin.

10. A. levies fine to the use of himself for life, and after his decease to the use of such person and his heirs as A. by his last will should appoint. The fee is in A. and he may covenant by deed to stand seised to the use of a second son &c. Ley. 39. 9 Jac. Brand's Case.

11. Lands settled, with power of revocation on payment of 40 s. Afterwards other lands are settled on the same trustees with like power. Two several sums of 40 s. must be paid on revocation of the uses raised by both fines. 9 Rep. 106. b. Mich. 10 Jac. in Lofield's Case.

12. Power of revocation was reserved on tender of 1 s. to B. to whom the remainder was limited; B. dies; a tender to the heir of B. tho' an infant 2 years old is good. Ley. 55. Trin. 15 Jac. Allen's Case.

13. A. seised in fee, covenanted to levy a fine to the use of himself in tail, remainder to such persons, and for such uses as he should limit by indenture, and for want of such limitation, remainder to B. for life, remainder to B.'s eldest and 10th son in tail, remainder to C. and his sons in like manner, remainder to the right heirs of A. with a proviso, that upon tender of 5 s. &c. he might revoke those uses and limit others. A fine was levy'd accordingly. Afterwards, by another indenture reciting the uses of the first indenture, and the proviso in it, A. made a new limitation to the use of himself in tail, remainder to B. for life, with like remainders as before to B.'s sons, remainder to C. for life, with like remainders to his sons, remainder to D. the plaintiff in tail &c. according to his power and the clause in the said indentures; and dy'd without issue. This is a good execution of the power, tho' 5 s. was not tender'd. For A. had a double power by the first indenture; the one to limit other uses to such persons, and for such estates as he pleased; the other to revoke the uses limited by the first indenture, and to limit new uses. And when he limits new uses, which cannot stand by the power reserved by the proviso, for lack of tender, the law will refer the limitation to the power he had to limit other uses &c. And 2dly, because the 2d limitation is expressly made according to his power, which refers to that power which he pursued. Allen. 83. Mich. 24 Car. B. R. Udal v. Udal.

It was touch'd whether the uses limited according to that power were revocable by the proviso. And Mainard who argued with the judgment said it might be a question. Ibid.

14. Power to revoke by indenture sealed in presence of three witnesses. He by indenture sealed in the presence of three witnesses covenanting to levy a fine, and levies it. The deed and the fine

Vent. 278. E. of Leicester's

Cafe. S. C. fine together make a good revocation. 2 Lev. 149. Mich.  
 —Wms's Rep. 169. 27 Car. 2. B. R. Wigfon v. Garret.  
 Arg. cites S. C.

See the State  
 of the Cafe  
 at (B).—  
 And Ld.  
 Chancellor  
 said, it was  
 held in Ld.  
 CRAWLY's  
 Cafe, that  
 where there  
 is notice of a power to revoke,

15. If A. in a voluntary settlement reserves a power to revoke with consent of three or more, and he afterwards *revokes with consent* of those persons as to one third part, and afterwards a conveyance is made, mentioning the revocation, but without reciting it in *hæc verba*, this is notice of a revocation, and the parties at their peril must inquire into the execution of it. Per Ld. Chancellor. 2 Freem. Rep. Mich. 1676. Ld. Banbury's Cafe.

the parties at their peril must look to the execution of it. Ibid. 9.

Tenant for  
 life of lands  
 in D. with  
 power of re-  
 vocation by  
 any instru-

16. Deed of feoffment to uses, with power of revocation *in express words*. A disposal by will is a revocation, without taking notice of the deed or the power in it. Raym. 295. Trin. 31 Car. 2. Guy v. Dormer.

ment in writing attested by two or more credible witnesses, by will attested by three witnesses expressly devised all his lands in D. to J. S. and W. R. He had no other lands in D. Upon reference to the Judges of C. B. they determined that the will operated as a revocation, though the will made no mention of the power. 2 Wms's Rep. 414, 415. Trin. 1727. Deg v. Deg.

Vern. 182.  
 S. C. Trin.  
 1683.—

17. A feoffment was made with power of a revocation; a subsequent mortgage to one of the feoffees is a revocation pro tanto only. Vern. 141. Hill. 1682. Thorne v. Thorne.

The condition of the redemption was, that on payment at the day, the mortgagor should have the lands in his former estate. 2 Vern. 441. Thorne v. Thorne.

Carth. 292.  
 S. C.—

For words  
 sufficient to  
 describe an  
 estate tail  
 to be re-  
 voked, must  
 of necessity  
 have the  
 same import  
 in the li-  
 mitation.  
 Skin. 325.  
 S. C. and  
 judgment affirmed in B. R.

18. A. settles land to the use of himself for life, remainder to B. and the heirs males of his body, remainder in tail to C. &c. with power of revocation as to B.'s remainder only. A. reciting the settlement to be to B. and his heirs males, omitting the words of his body, revokes and limits new uses to B. and his heirs males, but the date of the first deed was recited right, and so are the parties. Resolved that this is a good revocation, and a good appointment of a new estate tail, by his directing the said estate, in the said deed named, to be to the use of B. and his heirs males; which said estate so named was an estate tail. 3 Lev. 213. Trin. 1 Jac. 2. B. R. Gilmore v. Harris.

19. A devise of lands not now in settlement will not pass lands settled with a power of revocation. 2 Vern. 621. Mich. 1703. Litton alias Strode v. Falkland.

S. C. Gibb.  
 207 to 214.  
 And as to  
 the intelli-  
 gence, Ld.  
 Chancellor  
 said (pag.  
 223) that

20. A. seized in fee settled his estate in 1712 by lease and re-lease, to the uses therein after specified; with liberty at his will and pleasure to dispose of, change, or alienate the same estate, or any part thereof, for any estate or estates whatsoever as he should think fit, and to revoke all and every the uses thereby limited. And declares the uses to himself for life, with several other remainders, and a remainder

remainder to F. in tail. The said deed contains the following powers. 1. A power for A. by any deed or writing signed, sealed and delivered in the presence of two &c. witnesses, to demise, lease, limit or appoint the said premises to any person whatsoever &c. for so much yearly rent as he should think fit. And that it shall and may be lawful to and for the said A. at any time during his natural life at his will and pleasure to grant, sell or demise the premises or any part thereof, or by any deed &c. or by his last will &c. in writing, signed, sealed, delivered and published in the presence of three or more witnesses, to revoke, repeal and make void all and every, or any the use and uses, estate and estates, trusts and limitations &c. and to declare &c. the same, or such other new uses as should seem most meet to him, and thenceforth the estates before limited &c. to cease &c. and that the said A. may dispose of the same premises, and every part &c. thereof to such other person and uses as he shall think fit, any thing before mentioned to the contrary in any ways notwithstanding. The first part of this last proviso, viz. to grant, sell or demise, appears inserted by interlineation.—In 1715 A. by lease and release, reciting that he was indebted as specified in a schedule annexed, conveyed his estate to W. R. and W. S. and their heirs, in trust to pay the said debts by the annual profits or mortgage or sale, and after payment thereof to pay the overplus, if any, and reconvey such parts of the premises as are unsold to the said A. or to such person &c. and to such use &c. as A. by any deed or writing under his hand and seal, attested by two or more credible witnesses, should limit &c. This release was attested by two witnesses only.—A. died without issue. Lord Chancellor, assisted by Lord Ch. B. Reynolds and the Master of the Rolls, was of opinion that A. intended to reserve an absolute power over this estate, and either to revoke it by an express revocation, or by a conveyance to different uses, which are the two kinds of revocation, as is evident as well from the preamble which is interwoven with the consideration of the deed, as from the proviso; and in consequence of that intention, it is reasonable to suppose he meant to have a power to defeat it without taking any notice of it; and if no power had been reserved in the body of the deed, then would the preamble have given a general power, that a conveyance to different uses would have been as effectual a revocation as if expressly made; and that he thought any other construction would be forc'd and unnatural: that if A. had stopp'd with the first words, viz. (to grant, sell or demise) he had reserved an absolute power. Then came the words (or by any deed or writing &c.) Or is plainly a disjunctive introductive of a different sentence and a different power, as is plain from the words immediately following, viz. and then the uses [estates] so revoked &c. refer to the express power of revocation. That if the second part of the clause, viz. or by any deed or writing &c. had been [omitted or] dropp'd, and it had been (or to repeal &c.) it is plain they would be distinct powers, and ask'd why those words should alter the case? That the circumstance of three witnesses are only applicable to the express revocation, but neither goes to the first power,

whenever it was, the party that put it in thought it would be of some use or other; and it could be of use but to give A. an unlimited power over [ 493 ] the estate; and as A.'s intention was to reserve such a power, his Lordship said he would not abridge it.

power, nor to the general power of disposing at the end of the clause, viz. (*And that the said A. shall and may dispose &c.*) which is as much a distinct power as may be, and is larger than the first; for by this he might give his estate tail by will: that the express power of revocation could not by this construction be thought nugatory; for within the first power he could not be re-entitled in his former estate without a conveyance and reconveyance; nor could he have devised it: but admitting it to be so, he thought that a man's general intention is not to be superseeded, because a subsequent part of the deed is surplusage. And that the whole legal estate pass'd to the trustees by the deed of 1715. L. P. Conv. 390. 400. 12 June 1730. *Fitzgerald v. Lord Fauconberge*.—This decree was affirm'd in the House of Lords 27 Feb. 1730.

### (D) Power of Revocation *suspended*.

If one who has power to revoke an use makes a lease for years, and [ 494 ] levies fine for assurance of the lease without express use; the power of revocation is not extinguish'd by the fine, but suspended for the term. Mo. 616. Pasch. 42 Eliz. C. B. *Bullock v. Thorne and Standen*.—A lease for years suspends *quoad the term*, but after it is good. Per Hales. 1 Mod. 114.

1. A. Covenanted to stand seised to the use of himself for life, with divers remainders over to others, some for life and some in tail, with the reversion in fee to himself, with *general power of revocation* of all uses in remainder; and after he made a lease for years to a stranger, and after, during the term, he revoked it. The question was, whether he may revoke, or whether he has suspended his power of revocation by his lease during the term? Coke Ch. J. said, he may revoke for all except the term. But the doubt here is where he makes a lease without any power reserved to do so. Court divided. Mo. 788. Mich. 2 Jac. *Yelland v. Ficlis*.

2. If a deed of revocation be made, and the party had declared that it should not take place till 100 l. paid, there the operation of it would be in suspense till the 100 l. paid; and then it would be sufficient. Per Hale Ch. J. Vent. 280. cites Hob. 312. in Case of *Kibbet v. Lee*.

### (E) Power of Revocation extinguished or *determined by what Act*.

1. WHEN one has power of revocation, if he suffer any thing to be lawfully executed by force of it, he cannot afterwards make revocation. 5 Rep. 90. b. Trin. 42 Eliz. in *Hoe's Case*.

Mo. 605.  
Hill. 42  
Eliz.

Diggs's  
CASE con-  
tra, that

2. A. makes a feoffment of two acres to uses, with power of revocation. If he afterwards makes a feoffment of one of the acres, the power to revoke as to the other is extinguished. 1 Rep. 110. b. Hill. 28 Eliz. B. R. *Grendon v. Albany*.

fine or feoffment of part of the land is an extinguishment of the power as to that part only, and the power remains as to the residue.—1 Rep. 173. S. C.—S. P. Hob. 313. in Case of *Kibbet v. Lee*.—  
Add.

And. 67. Sir Richard Lee's Case.—If it be by *use*. But not so of a *condition annexed* to the land. Mo. 618. Pasch. 42 Eliz. Bullock v. Thorne.

So if one makes a conveyance with power to make leases, and with power of revocation, if he makes a *lease* [of part] he may revoke for the residue. Per Coke Ch. J. Mo. 788. Mich. 2 Jac. C. B. in Case of Yelland v. Fielis.

3. Power of revocation is extinct by *feoffment*; so by *fine* or *release*. Arg. 2 Roll. R. 337. cites 1 Rep. Diggs's Case.

A. enfeoffs B. with a proviso in the deed

that A. may revoke the feoffment. A. levies a *fine* to B. of the same land. This is an *extinguishment* of the proviso of revocation. Per Roll. Ch. J. Sti. 389. Mich. 1653. Bird v. Christopher.—2 Rep. 112. b. Albany's Case. cited 174. in Diggs's Case.

He that has only a *bare power* to revoke estates, and has no estate himself in the land, cannot by *fine* or *feoffment* or *release* or *extinguish* this power; because it is only an authority, and no interest. As if A. devises that B. shall sell his land, tho' B. levies a *fine*, or makes a feoffment, or releases all his right, yet he may sell the land. Mo. 605. Hill. 42 Eliz. Digges's Case.

But a power of revocation not in esse, but in *future* on a contingency, may be extinguished by a *fine*, or *feoffment* of the land, before the contingency happened. Mo. 605. cites the Case of Albany v. Grendon.—1 Rep. 110. b. S. C.—4 Le. 133.—Raym. 239. cites Ingram v. Parker.

† A. seised in fee, makes a voluntary conveyance of an undivided moiety of a manor *to the use of himself for life, then to first, second &c. son in tail, remainder to Sir M. W. in tail, remainder to his own right heirs*; with a *proviso* that it shall be lawful by deed sealed in the presence of 2 witnesses, to *revoke* these uses, and to *limit new ones*. After this A. levies a *fine*, and a week after the *fine* levied, by deed declares, that the intent of the parties at the time of levying the *fine* was, and now is, *that the fine shall be to the use of A. and his heirs*, and to no other use, intent or purpose whatsoever, and whether this *fine* hath extinguished the power of revocation, so that the declaration of uses comes too late, is the question. Adjudged that the power of revocation was extinct; but this judgment in C. B. was reversed in the Exchequer Chamber by six Judges against two. Skin. 35, 52, 71, 187. Herring v. Brown.—\* S. P. the *fine* and deed being by him, who being seised in fee, limited the estate with a reservation of such power, tho' he only limited an estate to himself for his life. Carth. 23. S. C.—S. C. cited Arg. Wms's Rep. 168, 169.—2 Show. 185. S. C. debated.—Adjudged. Vent. 368, 371. Pasch. 1 & 2 Jac. 2.—S. C. adjudged Comb. 11.

4. If A. makes feoffment in fee to diverse uses, with proviso that J. S. may revoke, and then the uses shall cease.—J. S. can't release this power; and *fine* or feoffment by J. S. shall not *extinguish* it; for the power is merely *collateral*. Per Popham Ch. J. 1 Rep. 174. Trin. 42 Eliz. Diggs's Case.

Mo. 605. S. C. says it was so adjudged, because it is only authority, and to interests

5. Whether *release* of a power of revocation in *part* be good or not, dubitatur. Mo. 605. Hill. 42 Eliz. in Diggs's Case.

6. Power of revocation by writing sealed and delivered &c. A revocation by a *will sealed* is a sufficient revocation; for the intent was satisfied. Per Jones J. Winch. 83. Trin. 22 Jac. C. B. says it was resolved in Case of Kennet v. Lee.

S. C. Hob. 312. by the name of KIBBERT v. LEE. Trin. 17 Jac. And

the power of revocation and limitation of new uses was limited to be done by him, *being in perfect health and memory*. But tho' the verdict did not find his being in perfect health and memory, yet it was well enough; for that shall be presumed unless the contrary be proved; and tho' revocations must observe the circumstances which the owner imposes on himself, yet no more shall be imposed upon him, but his power shall be taken favourably as agreeable to nature, that every man have free power over his own, which is the reason that the latter act, which cannot stand with the former uses, is construed a revocation; tho' according to the express words and vulgar sense it is none.—So where the power was, that he might by any writing seal'd &c. in presence of two or more credible witnesses, *in express words signify and declare his intention to revoke &c.* that then, and from thenceforth &c. the use &c. should cease; and tho' it was objected that the will is no revocation, because the words (in express words) exclude all implicit revocations, it was answered, that powers of revocation are favourably interpreted, because estates of inheritance depend upon them; that here the will is a revocation; because when *two acts are not consistent*, the latter is a revocation to the former; that in some things the donor &c. shall bind a power to *circumstances*, as for a deed to be executed before three witnesses &c. But where there is only a *general expression*, the latter act shall satisfy those general words.—Judgment was afterwards given, that the power was well executed. Raym. 295. Trin. 21 Car. 2. in Scacc. Guy v. Dormer.

7. Power reserved to revoke on condition the son married without consent, may by subsequent agreement by deed be defeated, and the conditional deed be determined. Jo. 411. Mich. 14 Car. B. R. Leigh v. Winter.

8. Power given by fine to tenant for life to make a jointure and leases for 31 years to raise portions for daughters, and that in such case the cognizees to stand seised to such uses. Per Hale Ch. B. The power seems to be well raised; but a bargain and sale in fee by tenant for life to raise the portions is not a good execution, nor does the bargain and sale in fee, or re-conveyance in fee by the bargainee destroy the power which is collateral, and the estate to be limited does not arise out of the tenancy for life, but out of the original estate; and in Noy's Report it is held, that a covenant to stand seised in fee does not destroy such a power, tho' he says that may be questionable, because the whole estate is there disturb'd, whereas the bargain and sale here displaces nothing; and if the bargainor had a power of revocation, he might well execute it after executing this conveyance. Hard. 413. 17 Car. 2. Edwards v. Slater.

9. If he that has a power of revocation makes a lease for life, quære whether this suspends the power only as a lease for years would do, or extinguishes it as a feoffment? Keyling and Twifden were of different opinions. Vent. 42. Mich. 21 Car. 2. B. R. Clerk v. Philips.

10. A settlement was made with power to raise 2000 l. portions, and after another settlement is made, by which all the portions in the former are released, except the power to charge the lands with the 2000 l. Now by this exception the power is continued, and in full force, and the operation is not to be abridged by any general expressions in the last settlement. Arg. Fin. R. 287. Hill. 29 Car. 2. in Case of Shipton v. Tyrrel.

Vern. 181.  
S. C. 1712.  
1683.

11. Settlement on three, with power of revocation; afterwards the grantor made a mortgage in fee to one of the three. Per North K. This is a revocation *pro tanto* only. Hill. 1682. Vern. 141. Thorn v. Thorn.

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12. If a power of revocation is annexed to an estate for life, and that estate determines before the power is executed, the power is by that means extinguished. Per Lutwiche J. Carth. 24. Hill. 3 & 4 Jac. 2. B. R. in Case of Herring v. Brown.—But see *supra*, pl. 3. in notis S. C. adjudged contra, and the reason.

See (R) 1.  
a. and the  
notes there.

13. A man makes a settlement, wherein was a power that he might from time to time by deed or writing under his hand and seal revoke the uses thereof, and by the same or any other deed, limit and declare new uses: in pursuance of this power, he revokes the old uses, and by the same deed limits new uses, without annexing any new power of revocation to those new uses: afterwards, thinking he had, by virtue of the first settlement, a power of revocation toties quoties, he by another deed revokes the last uses, and again declares other uses of the same lands; and if he had such power was the question? It was agreed he might in the deed of revocation have annexed a power of revoking the uses thereby declared,

declared, and might afterwards have executed that power accordingly; but in this case there being no such new power of revocation annexed to the new uses, it was decreed that his power of revocation by the first deed was executed, and at an end, and by consequence that the revocation afterwards was without any warrant, and so the uses limited upon the first revocation must stand; and this decree was affirm'd in the House of Peers. Abr. Equ. Cases. 342. Trin. 1717. between Hele and Bond.

14. A term was created in a marriage settlement for raising 3000 l. portions for daughters, payable at 18 or marriage, on default of issue male, with a power for the father to revoke with consent of trustees. The wife died, leaving only one child, which was a daughter, who afterwards married. It was insisted that the daughter being 18 and married, the portion was become vested, and could not now be divested by the power of revocation. But Lord C. Macclesfield held the power of revocation to be still subsisting, and that the father with the consent of the trustees may yet revoke, and may do so at any time before the portion is paid. Hill. 1722. 2 Wms's Rep. 93. to 101. Reresby v. Newland.

This decree was afterwards affirm'd in the House of Lords. Ibid. 102.

### (F) Determined in what Cases.

1. A Conveyance of lands was made with a proviso of revocation upon an act done by the two grantors with consent of their wives, viz. if they or either of them be living then to revoke. It was resolved that tho' one of the wives died, yet the survivors may revoke the conveyance, for the consent is constrained by this word (*then*); so that those words (if they or either of them) being coupled and joined with the word (*then*) explains the intent and meaning of the deed to be, that it is not necessary that both should join in the revocation, one being dead. 2 Roll R. 178. Trin. 18 Jac. B. R. Gardiner v. Savill.

### (G) Revocation decreed, tho' not strictly pursued.

1. A Tender of the revocation-money was made at a different place than express'd in the deed, yet it was held good in favour of a purchaser. 2 Chan. Rep. 71. 24 Car. 2. Thorne v. Newman.

Fia. R. 38. S. C. Mich. 25 Car. 2. See Mortgage (X).

2. A. seised in fee made a settlement in tail, with power of revocation by any writing under his hand and seal, in the presence of three witnesses. He made his will under his hand and seal, reciting his power, and declared that he revoked the settlement, but the will had but \* two witnesses who subscribed, tho' a third was present; and died. The lands descended to B. his son, who

2 Freem. Rep. 63. pl. 72. Anon. [ 497 ] seems to be S. C. and Lord Chancellor

decreed it to be good enough; for the appointing three witnesses, was only that there might be clear proof that it was done; and here it was clear enough that it was done, tho' here were only two witnesses.—See (A. 14.) pl. 17. the quare in the margin.

mortgaged the same. Lord Chancellor decreed payment of the mortgage-money, and said that here was an execution of the power in strictness, tho' the third witness did not subscribe. But if there had not, equity would help in such a little circumstance, where the *owner of the estate had fully declared his intent*. And tho' he said he would not supersede fines and recoveries, yet where a man was only tenant in tail in equity, this Court should decree such disposition good; for a trust and equitable interest is a creature of their own, and therefore disposable by their rule. Otherwise where the entail was of an estate in the land. 2 Vent. 350. Hill. 32 and 33 Car. 2. in Canc. Sayle v. Freeland.

The proof of the tender was, that *A. being in a passion with the defendant, to whom the tender was to be made, high words pass'd between them, and she told him she would undo*

3. A. makes a voluntary settlement with power of revocation *on tender of a guinea*. A. never tender'd the guinea, or ever declared she intended to revoke the former settlement (which had A. done (as it seems) and it had been a sober solid act, and done animo revocandi, it would in equity have been sufficient, tho' it had not all the formalities mentioned in the power) but afterwards *settled the same lands to different uses*. It was not allowed to be a sufficient revocation. Per Cur. This Court may supply an informal or defective revocation, but cannot make a revocation where there is *no revocation*. Per Jefferies C. Tr. 1688. 2 Vern. 69. Arundell v. Philpot.

*the settlement, and in her anger threw a guinea upon the ground*. But Lord Chancellor held that this did not amount to a revocation in equity; but had it been proved that a guinea had been *deliberately tender'd, and declared at the same time that she did it with an intent to revoke the settlement, tho' the deed had never been sealed, or if the deed had been sealed to revoke it, and no guinea tendered*, this Court would have supplied the defect of one particular circumstance, where it appeared that the party did deliberately and advisedly intend the thing; but what was said in a passion the Court will not regard. 2 Freem. Rep. Trin. 1688. Arundell v. Philpot. S. C.—S. C. cited by Mr. Talbot. Arg. 10 Mod. 476. Pasch. 8 Geo. 1. in Case of Lady Coventry v. Lord Coventry, says it was sent to law to have it tried, Revoked or Not revoked; and that at law the party was so fortunate as to prove the tender.—S. C. cited by Mr. Baron Powell. 3 Chan. Cases 70. in Case of Lord Mountague v. E. of Bath.—S. C. cited Ibid. 108. per Holt Ch. J.

S. C. cited Arg. Ch. Prec. 472.—S. C. cited Arg. 10 Mod. 468. Pasch. 8 Geo. accordingly.

4. By a power reserved in a deed, the revocation was to be *in presence of three Privy Counsellors*; the revorcer did by will revoke the deed, but being then Governor of Jamaica, this was held a good revocation, because *he could not have three Privy Counsellors there*. 9 Mod. 14 Mich. 9 Geo. 1. Arg. cited as the Case of Mountague and Bath.

3 Chan. Cases 55. to 128. S. C. and decreed contra in Chancery, and there see the arguments of the Judges assistants, and Lord Keeper Somers.—2 Freem. Rep. 121 & 193. S. C. by the name of Dutchess of Albemarle Monk v. Earl of Bath.

5. Since the statute 27 H. 8. of uses, the courts of common law held that powers of revocation of estates executed were to be taken strictly, and so, if not pursued, they would not impeach or destroy an estate already executed by legal conveyances; but in  
the

the Courts of Equity they soon found that the construction was too artificial, and not according to natural equity; and so they construed those powers, as a reservation of so much of the ancient dominion of the estate, to be under the controul of the tenant for life, & *cujus est dare illius est disponere*: and as often as any such dominion is reserved, the tenant for life may contract about it; and when a marriage &c. contract is made in contemplation of the execution of such a power, it was a real lien upon the estate. G. Equ. R. 165. Pasch. 8 Geo. in Case of Lady Coventry v. Coventry.

### (H) Revocation. Decreed, *tho' not executed.*

[ 498 ]

See (G)

pl. 5.

S. P. De-

creed, per

Ld. Cowper.

Ch. Prec.

471. Pasch.

1715. Fig-

got v. Pen-

rice.—But

had been

1. A Woman made a settlement of lands in favour of her husband, with power to revoke; she afterwards sent several letters to her lawyer to prepare a deed to revoke it, and to give the estate to the heir, but never executed such deed. The Court would not make a decree on her intention only. Arg. 9 Mod. 15. Mich. 9 Geo. 1. In the Lady Coventry's Case.

hindered from the exercise of this power by the act of her husband, then the Court said they would have interposed. Arg. 10 Mod. 473. Pasch. 8 Geo. S. C. cited.—But where a power was bound by articles preceding, and for a valuable consideration, there a draught of a settlement was ordered to be specifically performed. 9 Mod. 19. Mich. 9 Geo. Lady Coventry's Case.

### (I) In what Cases *new Uses* may be limited; and how. See (C).

1. A Man may revoke the old uses and declare new by the same deed. 1 Rep. 174. Trin. 42 Eliz. B. R. Digges's Case.

S. P. Mo.

682. Hill.

45 Eliz.

B. R. Fitz-

william's Case.—The very making a new conveyance without words of revocation is sufficient, if all other circumstances required in the first deed are observed in the second. 10 Rep. 144. Mich. 10 Jac. Scroope's Case.—S. C. cited Winch. 83. per Jones J.—A conveyance to different and inconsistent uses, is an effectual revocation. Gibb. 215. Fitzgerald v. Ld. Fauconberge.—ibid. 221.

2. Settlement by fine with power of revocation, and to limit new uses; after there is a second indenture with such power of revocation, but no power to limit new uses; then a third indenture of revocation, and also declared new uses, by not reserving expressly power in the second deed to limit new uses. He can only revoke, and cannot limit new uses by virtue of the estate raised by the first fine; but the estate limited by the third indenture, may be well raised by a fine subsequent, tho' not by the former fine. Sid. 343. Mich. 19 Car. 2. B. R. Ward v. Lenthall.

Where a man makes a settlement &c. to uses with power of revocation, when he hath executed that power he cannot limit new uses, but if it had been with a

power to revoke and limit new, then he may revoke and limit new, with a power of revocation annexed to the new, which if he doth afterwards revoke, he may again limit new uses, according to the first power, and so in infinitum; but always the new uses must correspond to those circumstances &c.

*Uc. which the first power appoints; for that is the foundation. Vent. 198. Paich. 24 Car. 2. B. R. Sir S. Jones v. Lady Manchester.—See (b) pl. 2. and the Notes there.*

He that has power to revoke has also power (tho' not expressed) 3. A. on conveyance of lands, reserves power to revoke, *without saying any thing of limiting new uses; yet A. may limit new uses.* Per Lord Finch. Chan. Cases 242. Mich. 26 Car. 2. Anon.

to make a new limitation. Hill. 32 and 33 Car. 2. 2 Chan. Cases 46.—For otherwise the feoffees would be seized to their own use. Mod. 40. Per Twissden J. cites Lat. . . . . Sir William Shelly's Case.

A conveyance was to such uses as E. should direct, limit and appoint. E. voluntarily, by writing under her hand and seal, limited the uses to A. and B. and being a feme covert, kept the deed in her own or her husband's hands. Afterwards E. destroyed this deed, and limited the uses to C. and there was a power of revocation reserved in the first deed. Ld. Chancellor held the last limitation void, and that the first can never be altered, being made by deed. But in such case a limitation by will may be altered as the party pleases, a will being in its own nature revocable and alterable, and the last shall take place. For trusts are governed by the rules of law, tho' the execution of them is compellable only in equity. But if the power, reserved to limit by deed, be from time to time, then he may limit and revoke toties quoties. 2 Freem. Rep. 61. Mich. 1680. Hatcher v. Curtis and Sir Richard Anderfon.

A. settled land with power from time to time by deed &c. to revoke, and by the same or any other deed to limit new uses. A. by deed revokes the old uses, and by the same deed limits new uses, but does not annex any new power to revoke these new uses, and afterwards declares other uses. It was [ 499 ] agreed, that upon the first revocation he might have annexed a power to revoke the uses in that deed; but not having so done, his power of revocation was gone, and those uses must stand. Decreed and affirmed in the House of Lords. Paich. 1717. Ch. Proc. 474. Hele v. Bopd.

[For more of Powers in general, see Authority, Fraud, Revocation, Uses, and other proper Titles.]

## Prebend and Prebendary.

1. A Layman may be presented to a prebend; for *non habet curam animarum*. And per Coke, all the possessions of prebends were at first the bishops. 7 E. 3. 5. 30 E. 3. 26. and de mero jure do pertain to the bishops. Cro. E. 79. Bland v. Madox.

Nor can they charge the church without the

parson and ordinary; quod nota. Ibid.—But a prebendary shall have writ of ingressu sine assensu capituli; and there it was said that he *baſee-fimple*, and yet if he *aliens and dies, or resigns, the successor may enter*; and therefore he has not *fee-fimple* otherwise than a parson has. Br. Prebend, pl. 3. cites F. N. B. 194.

3. In juris utrum the allegation was, that the parson of D. was seised in his demesne as of fee in right of the church aforesaid, tempore pacis &c. Br. Prebend. pl. 4. cites Book of Entries.

[For more of Prebend and Prebendary, see Confirmation, Estates, Successor, and other proper Titles.]

## Precedents.

### (A) Good. What are in general.

1. Precedents of Courts, as well as laws, are built upon reason and justice, and *santum habent de lege quantum habent de justitia*. Hob. 270. Courteen's Case.

2. Precedents which pass *without challenge* of the party or *de- bate* of the Justices are not regarded as law. 4 Rep. 94. Tyn. 44 Eliz. in Slade's Case.

R. 375.—It is a rule that precedents which pass *sub silentio* are of little or no authority; but that is to be understood of cases where there are judicial precedents to the contrary; per Parker Ch. J. Mich. 1712. B. R. Wms's Rep. 227. In Case of the Queen v. Bewdly Corporation. — S. P. Vaugh. 399. in Case of Process into Wales.

Arg. S. C. cited Hard. 98.—Arg. S. C. cited 2 Roll.

3. The pretended *custom of foreign attachment* in London by the ordinary before administration granted, is unreasonable and void, tho' the defendant produced several records of the usage [ 500 ] for above 100 years, but none were *controverted*; per Cur. Carth. 345, 346. Mich. 7 W. 3. Masters v. Lewis.

### (B) Established by long Usage, tho' otherwise not good.

1. THE sheriff returned, *Quod mandavi A. B. ballivo libertatis ducatus Lanc. &c. qui habet retorna omnium brevium infra libertatem predict. qui sic respond. quod scire feci prefato R. C. &c. quod sint &c.* Billing. The return is not good; for it should be *ballivo libertatis ducis Lanc.* for the dutchy has no capacity to have a liberty; and yet because *precedents were shewn*, Mandavi ballivo libertatis as above, and Mandavi ballivo libertatis Sancti Edmundi de Bury, & Mandavi ballivo libertatis de Alta Pecco,

In an action upon the Case the plaintiff had judgment by nihil dicit, and thereupon had a writ of enquiry of damages.

to the sheriff & Mandavi ballivo libertatis ducis Lanc. and such like, it was to make return, who returned, awarded a good return. Br. Return de Briefs, pl. 11. cites 33 H. 6. 20.

*Quod mandavit J. G. ballivo libertatis Rad. Hare Mil. Hundredi de B. cui excec. præd. brevo. totaliter restat. fiend. & quod alibi infra com. præd. per se fieri non potuit, qui quidem ballivus sic sibi respondit, and so sets down an inquisition before the bailiff, and 40 l. damages; and upon error brought it was agreed by all the Judges, that the return was insufficient; but yet they would not reverse the judgment, because there were divers precedents accordingly, both in B. R. and C. B. Hob. 83. pl. 109. Virely v. Gunstone.*

Fin. Law 2. The sum of 100 l. per ann. is due to the Mayor and Commonalty of Southampton out of the King's customs. Acquittance by the Mayor only is not good; by all the Justices. And yet because he is the head of the corporation, and there were 100 precedents shewn thereof in like manner in time past, therefore the acquittance of the Mayor was allowed; quod nota. Br. Corporations, pl. 87. cites 2 R. 3. 7.

and commonalty are one indivisible body; the mayor, as mayor, can do nothing regularly, for he is the head of the corporation aggregate, and is only a part of it; but usage and precedents are not to be neglected in things indifferent, or which are not mala in se. Jenk. 162, 163. pl. 9.

Ibid. cites 3. The informer's name was omitted in the proceedings on the statute of usury, and the whole proceedings after were in the name of the Queen only; yet it was held not erroneous, because this manner of proceeding had been used in the Exchequer in the time of H. 8. and at all times after as appears by the precedents. But if the precedents had not ruled it, the law had been clear contrary. And. 49. pl. 123. Emmot v. Fulwood.

4. Indictments of felonies done in the county of Gloucester, taken and tried in the city of Gloucester, since it was made a town and county by R. 3. were held to be good. And. 292. pl. 3. Hill. Vac. 35 Eliz.

5. In debt upon the statute of E. 6. of tithes, the statute was misrecited; for it is recited as beginning November 4, 2 E. 6. where it began the first E. 6. and continued by prorogation till November 4. 2 E. 6. But not allowed, because there are 1000 precedents to the contrary. And the altering it would disturb all the judgments that ever were given in this Court. Yelv. 126. Pasch. 6 Jac. B. R. Oliver v. Collins.

6. Tho' the ecclesiastical commissioners had used to imprison by 20 years without exception in certain cases, yet when this comes before the Court judicially, they ought to judge according to law. 12 Rep. 83. Pasch. 9 Jac. in Sir Wm. Chan- cey's Case.

Hob. 84. pl. 7. In waste the plaintiff made title, because one such enfeoff'd another to the use of the plaintiff and his heirs, and omitted that he enfeoffed the other and his heirs. And upon view of precedents, the writ was awarded good. Mo. 871. Trin. 12 Jac. Rot. 1349. in C. B. Seel v. Oxenbridge.

[ 501 ] 8. Ded. potestatem of a fine bears date before the writ of covenant bears date, this is communis error; and because it is a common assurance, it is not now to be disallowed; per Coke and

and Dod. Roll. R. 223. Trin 13 Jac. B. R. Herbert v. Binion.

9. Error was assigned, for that the *venire facias* in C. B. was 12 *liberos & legales homines quorum quilibet habeat quatuor librat.* where the new statute is *quatuor libras*; for it was said, that *libratus* is a pound weight. But because it was a general case, the Justices would view how the Parliament Rolls was, and it was found to be *libras*. And then it was mov'd again, and Popham said, that the intent of the statute was only to have sufficient jurors. Gawdy agreed to that, and that the *statute is to be expounded, as the usage has been ever after the making of it*, and the form of the writ is not upon any demand upon title. Fenner agreed saying the statute *de mercatoribus* is, that the manner of the recognizance shall be of money sterling, but it is sufficient if it be lawful money. To which Clench agreed; for it was said, that if that should be reversed, a 1000 judgments in C. B. would be reversed upon the same point. Noy. 172. Bisse v. Wills.

10. Error of a judgment in Cornwall in debt upon an obligation. The error assigned was, because the *trial of the issue* joined there was *by 6 jurates only*. Rolls, for the defendant moved, that it is not error; for it is returned, that he tried it there by 6 *secundum consuetudinem ibidem a tempore &c.* before used; and the Court being by prescription, the trial then, by custom, may be by six; and there by multitudes of records in 20 several courts in Cornwall where trials may be by six by customs there used; wherefore, if it should be reversed, many others should be reversed. But all the Court held that such a custom is void, and against the common law, and there cannot be an exemption of persons from being jurors, unless there be sufficient jurors besides the persons exempted to make trials: and Jones said, Although in some parts \* of Wales there be such trials by six only, it is by reason of an act of parliament of 34 H. 8. which appoints that such trials may be by six only, where the custom hath been so, which proves that when they were united to England, and to be governed by the laws here, such trials could not be, unless they had been so provided for by parliament; whereupon the judgment was here reversed, Cro. C. 259, 260. Trin. 8 Car. B. R. Tredymmock v. Perryman.

\* S. P. 4  
Le. 155.  
Arg.

11. The constant practice and received opinion since SIR MOYLE FINCH'S CASE, 6 Rep. has been, that which was *parcel of a manor in reputation only* shall pass by a common recovery of a manor. But Twissden J. said, that SIR MOYLE FINCH'S CASE, reported by Ld. Coke, differs from the judgment then given, and that Serjeant Finch who was then concerned went to the Ld. Coke, and told him that he was dissatisfied, and would have it in judgment again, but Ld. Coke dissuaded him, and afterwards almost all the Justices gave under their hands to the serjeant, that the manor there mentioned did not pass. But inasmuch

as the constant practice had been otherwise in settlements since that time, they thought it would be *very dangerous to question it*. Sid. 190, 191. Pasch. 16 Car. 2. B. R. in Case of Thin v. Thin.

\* The not shewing in the caption of an indictment at a leet, whether the Court were bolden by charter or prescription, is helped by the multitude of precedents. 2 Hawk. Pl. C. Abr. 235. f. 77.

12. In many places, by prescription, *Leets are held at other times than within a month after Easter or Michaelmas*. In all Leets they only say, *Ad cur. &c. tent. such a day, without shewing their \* authority*; it had been a good objection not to shew authority, if constant practice had not been otherwise. 12 Mod. 4. Pasch. 3 W. & M. The King v. Gilbert.

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13. *Debt was brought upon a judgment in B. R.* The defendant pleaded in abatement, that a writ of error in *Cam. Scacc.* was then pending upon this judgment; to which the plaintiff demurred, and it was adjudged for the plaintiff, being argued by Serjeant Levinz for the plaintiff. And Sid. 236. 4 H. 6. 31. and 18 E. 4. 6. were cited by him to be resolv'd, and a Case was cited by Dolben to be adjudged accordingly in the time of Roll, and after affirmed in parliament before all the Judges in England between LIMERICK AND . . . . . and tho' it had been stuck at, and Vaughan questioned it, yet it had been oftentimes so ruled. And it was held in the Case of DANVERS AND SMITH, in the Exchequer Chamber, that such plea is not good in bar, but good in abatement. But this difference was not thought reasonable. And Holt Ch. J. said, if it was not for the current of authorities e contra, it seemed hard to him that such an action lies. For the writ of error is a supersedeas to an execution, and therefore pari ratione it ought to be a supersedeas to all the ways to come at an execution; and he cited the Case of READ AND BEARBLOCK, where a man pays a security of an inferior nature pending a writ of error upon a judgment on a security of an higher nature; this was not a devastavit; which shews that the writ of error had so totally suspended the effect of the judgment, that it shall not have any regard or essence; but this notwithstanding it was, tho' with some reluctance, adjudged by him and all the Court ut supra. Skin. 388. Mich. 5 W. & M. B. R. Grandvill v. Dighton.

14. *An elegit was not taken out within a year and a day after the judgment, but continuances were entered on the roll.* And after the year and the day an elegit was taken out without a scire facias, whereupon it was moved to set aside the execution. And per Cur. unless a writ of elegit was actually taken out within the year and a day, the award thereof afterwards would be to no purpose; and therefore this elegit was irregular without a scire facias first sued out. But upon examination of several of the ancient practising clerks then in Court, it appeared that it had been in the constant practice amongst them for many years, only to award an elegit with continuances on the roll, and to take out that writ at any time afterwards, without suing out any scire facias;

facias; therefore the Court (considering the inconveniency of opening a gap to destroy so many executions for this irregularity, and because the practice had prevailed so long that it was now become the law of the Court) ordered that the execution should stand good. Carth. 284. Mich. 5 W. & M. B. R. in Case of Seymour v. Greenwill.

15. Tho' there are no precedents of such or such proceedings but since the time of H. 7. yet if the *current of precedents* have been so ever since, we ought rather to run with the tide than to reverse all the judgments that have been given since; for in some cases communis error facit jus; per Powell J. and judgment accordingly. Farr. 93. Mich. 1 Ann. B. R. in Grips v. Ingledew.

S. P. per Holt Ch. J. Farr. 115. in Case of Taylor v. Griffith.—Bridgm. 21. cites Pl. C. 163, 320. 39 H. 6. 30.

4 E. 4. 19.—Le. 9. in Cater's Case. S. P.—Jo. 417, 418. in Case of Mounson v. Bourne.—A multitude of judicial precedents in Court make a law, as the case of concurrent leases. Hard. 68. Trin. 1656. in Case of Vaughan v. Mansel.—But two or three precedents ought not to prevail against the fundamental rules of law. Hard. 52. Hill. 1655. Walsingham v. Baker.

### (C) Of what Regard Precedents are in Law.

1. IF we shall adjudge *contrary to received precedents*, it will be of evil example to the young apprentices and students of the Law, inasmuch that they will not know what to give credence to; whether old books or new judgments. 1 Show. 124. Arg. cites 33 H. 6. 41. per Priot.

2. Two or three precedents will not make a law, and especially [ 503 ] where there are 40 to the contrary. Br. Return de Brief, pl. 93. cites 5 E. 4, 109.

3. In *venire facias* the sheriff returned the names of twelve only upon the back of the writ, and not in a schedule as is usual, and he returned *Venire feci*, and not *Executio istius brevis*. And all the Justices of both Benches agreed, that they would not change the ancient course for mischief which might happen; for if twelve only should be return'd, none can have jury without a tales, if any be challenged; by which they caused the sheriff to amend the return in pain of amercement; and yet the writ is, *Venire facias 12 liberos & legales homines &c.* Br. Return de Briefs, pl. 84. cites 2 H. 7. 8.

Jenk. 172. pl. 38. cites S. C. and says the sheriff returned 12 only, according to the words of the writ, where he ought to have returned 24. according to

constant usage, for speeding the trial in case of challenge, death, sickness, or delay of the tales; the sheriff shall be amerced for this return. And adds, Note the care of the law in preserving ancient forms, and yet upon experiment of a mischief, although the forms of a writ are not to be altered, yet precedents and constant usage must be observed.—S. P. Mo. 218. cites S. C.—S. P. Sav. 124. Mich. 32 & 33 Eliz. Mathew v. Harecourt.

4. A counsellor ought not to be heard to speak against common precedents. 1 Show. 124. cites 13 H. 7. 23.

5. A will, whereby the heir was disinherited, and the estates given to 2 infants, strangers, tho' obtained by great fraud and circumvention of the father of one of the infants, was denied to be

In the Case of FRY v. PORTER, Mod. 307.

Pasch. 22  
Car. 2.  
in Canc.  
Vaughan  
Ch. J. said,  
He wonder-  
ed to hear of  
citing of

be set aside for want of a precedent, tho' the Ld. Chancellor declared his resolution to do all that he could; and tho' he had directions from the House of Lords to decree according to justice and equity tho' no precedent could be found. 2 Ch. R. 236. 15 Car. 2. Roberts v. Wynne.

precedents in matter of equity; for if there be equity in a case, that equity is an universal truth, and there can be no precedent in it; so that in any precedent that can be produced, if it be the same with this case, the reason and equity is the same in itself; and if the precedent be not the same case with this, it is not to be cited, being not to that purpose. But Bridgman Ld. Keeper said, Certainly precedents are very necessary and useful to us; for in them we may find the reasons of the equity to guide us; and beside, the authority of those who made them is much to be regarded. We shall suppose they did it upon great consideration and weighing of the matter, and it would be very strange and very ill, if we should disturb and set aside what has been the course for a long series of time and ages.—Hale Ch. B. said, He knew there is no intrinsic difference in cases by precedents; but there is a great difference in a case, wherein a man is to make, and where a man sees, (and is to follow a precedent; in the one case a man is more strictly bound up, but in the other he may take a greater liberty and latitude; for if a man be in doubt in æquilibrio concerning a case, whether it be equitable or no, in prudence he will determine according as the precedents have been, especially if they have been made by men of good authority for learning &c. and have been continued or pursued.

6. Precedents in *actions for words* are not of equal authority as in other actions; because *norma loquendi* is the rule for the interpretation of them, and this rule is different in one age from what it is in another. Per Cur. 10 Mod. 197. Hill 12 Ann. B. R. Harrison v. Thornborough.

7. In the case of a laps'd devise by the devisee's dying in the testator's life-time, Ld. Ch. J. Parker, in delivering the resolution of the Court, said, that he must have thought himself obliged to have submitted to the number and weight of authorities in that case, tho' he had not been satisfied with the reason upon which they were established; that to shake the law, when firmly established, is not to be done without the greatest danger to the estates and properties of the subject. 10 Mod. 375. Hill. 3 Geo. 1. B. R. in the Case of Goodright v. Wright.

8. The altering *settled rules concerning property*, is the most dangerous way of removing land-marks; per Parker Ch. J. Wms's Rep. 399. Hill. 1717. in the Case of Goodright v. Wright.

9. Where things are settled and *rendred certain*, it will not be so material, how, as long as they are so, and that all people know how to act; per Ld. C. Parker. Wms's Rep. 452. Trin. 1718. in Case of Butler v. Duncomb.

10. Ld. C. Talbot said, he thought it much better to stick to the known general rules than to follow any one particular precedent which may be founded on reasons unknown to us. Such a proceeding would confound all property. And then citing the Case of LADY LANESBOROUGH v. FOX, as of the strongest authority to the Case in point, his Lordship said, that tho' it had not been in the House of Lords, he should have thought himself bound to go according to the general and known rules of law. Cases in Chan. in Ld. Talbot's time, 26, 27.

11. It is dangerous to alter old established forms. Per Ld. C. Talbot. Cases in Chan. in Ld. Talbot's time 196. Pasch. 1736.

in the Case of a Ne exeat regnum to Scotland since the Union.  
Hunter v. Maccray.

[For more of Precedents in general, see *De Crecas Regnum* (B) pl. 13, and other proper Titles.]

## Præcipe quod reddat.

### (A) Lies against whom, and in what Cases.

1. **PR**æcipe quod reddat of *pasture for two oxen* lies against him who is *not tenant of the soil*. Br. Precipe quod reddat, pl. 39. cites 4 E. 2. and Fitzh. Breve 793.

But it does not lie against tenant of the soil. Br.

Præcipe quod reddat, pl. 29. cites 4 E. 2. and Fitzh. Breve 792, 793.—For against tenant of the soil lies always *quod permittat*, and not præcipe quod reddat. Br. Præcipe quod reddat, pl. 2. cites 27 H. 8. 12.

2. *Præcipe quod reddat* lies against a parson, but *not* against a vicar; for the franktenement is only in the parson. Br. Dean and Chapter, pl. 34. cites 15 Aff. 14.

3. If *feme inheritrix* takes baron, and they have issue, and the feme dies, there the law adjudges the franktenement in the baron, as tenant by the curtesy immediately without entry, and præcipe quod reddat lies against him. Br. Precipe quod reddat, pl. 38, cites 21 E. 3. 49. and Doct. & Stud. lib. 2.

4. *Præcipe quod reddat* does not lie against the heir within age, while he is within age. Br. Precipe quod reddat, pl. 29. cites Fitzh. Breve 897. 26 E. 3. 57.

5. In case of *rent service*, a man shall have præcipe quod reddat or assise against other than tenant of the land where there is a *pernour*. Br. Precipe quod reddat, pl. 9. cites 31 Aff. 31. per Thorp.

And where there is lord, mesne and tenant &c. and the tenant holds

by 2d. and the mesne over by 10s. if the 10s. be deny'd, the lord has not any against whom to bring his writ to recover the rent of 10s. but against the mesne, who is his very tenant; for in law there is no other who can be adjudged his receiver or pernour. Ibid.

6. In præcipe quod reddat, it was agreed for law, that if a villein purchases, and the lord does not enter, yet præcipe quod reddat may be brought against both; for if the lord enters pending

So between mortgagee and mortgagor; and

yet the contrary is said elsewhere, between disseisor and disseisee; and if the villein or mortgagee takes the entire tenancy, and pleads to the writ, the demandant by the special matter shall maintain his writ; quod nota. Ibid.

[ 505 ] 7. Præcipe quod reddat, assise &c. lies against the Queen. Br. Precipe quod reddat, pl. 32. cites 11 H. 4. 67.

8. If a man has common certain in *jure uxoris*, or in tail, and grants it over, and dies, the heir or feme may have *cui in vita* &c. against the pernour of the common, but not against the tenant of the soil. Per Shelley, which Fitzherbert utterly denied, and said that no præcipe lies in this case. Br. Precipe quod reddat, pl. 1. cites 27 H. 8. 12.

9. Præcipe quod reddat does not lie but against tenant of the franktenement. Br. Estates, pl. 46.

Writ of dower lies against guardian, and yet he is not tenant of the franktenement. Br. Precipe quod reddat, pl. 35. cites F. N. B. Writ of Dower.—And writ of ingressu ad terminum qui preterit lies against tenant, *per autem vie* after the death of *cestui que vie*. Ibid.—And writ of dower lies against guardian in fact, and against the grantee of his interest, but not against his lessee for years. Ibid.—And lies against the committee of the King. Ibid.

See Prærogative, (Q.4.) pl. 7.

(B) Lies for whom, in respect of Estate, and what amounts to it.

1. WRIT of entry in nature of assise is a præcipe quod reddat. Br. Precipe quod reddat, pl. 13. cites 4 H. 4. 1.

2. So writ of escheat is a præcipe quod reddat. Br. Prærogative, pl. 119. cites Regist. fol. 165.

S. P. But he who has feignory for life may have cessavit. Br. Cessavit, pl. 40. cites S. C.

3. Termor of a feignory shall not have cessavit, if the term ceases; for this is præcipe quod reddat, which none can have but he who demands franktenement. Br. Precipe quod reddat, pl. 24. cites 9 H. 7. 16. per Wood; quod non negatur.

4. If tenant for life surrenders to him in reversion out of the land, to which he agrees, the franktenement by this is in him immediately, and he is tenant without entry, as to the bringing of an action by præcipe quod reddat, but he shall not have trespass without entry. Br. Surrender, pl. 50. cites 21 H. 7. 7.

(C) Of what it lies.

And so præcipe quod reddat of profit approprietor, but of common of pasture

1. Præcipe quod reddat of \*pasture for two oxen, and well. And so see that in such special case, præcipe quod reddat lies of common of pasture, but it is not by name of common of pasture. Br. Demand, pl. 42. cites 4 E. 2. and Fitzh. Brief 792, 793.

lies quod permittat. Ibid.—\* S. P. Br. Precipe quod reddat, pl. 30. cites F. N. B. 217.—S. P. Ibid.

*Ibid.* pl. 31. cites F. N. B. 212.—S. P. or the like &c. Br. Præcipe quod reddat, pl. 1. cites 27 H. 8. 12. Per Fitzherbert and Shelly J.—*So of common for two oxen*, per Shelley; but contra Fitzherbert clearly; for there is a *diversity between pasture and common*; for if I grant you pasture for 20 beasts in my manor, I shall appoint you where you shall have the pasture; but if I grant to you common for 20 beasts in my manor, you shall have it per my and per tout; note the diversity.—*Ibid.* Præcipe quod reddat lies of *pasture for two cows*, but not of *common of pasture for two cows*; per Atheton; but the other justices held it to be *all one*. Br. Præcipe quod reddat, pl. 13. cites 4 E. 4. 1.—Br. Common, pl. 45. cites 4 E. 4. 1. 2.

2. Mortdancester does not lie of *homage* nor of *fealty*, but writ of customs and services, because they are not annual; and so it seems of præcipe quod reddat. Br. Præcipe quod reddat, pl. 40. cites 6 E. 2.

3. Cui in vita of *three houses and two rodd of land, and of pasture for 200 sheep cum pertinentiis in D.* And well by the opinion of the Court. Br. Præcipe quod reddat, pl. 41. cites 6 E. 2. [ 506 ]

4. It does not lie of an *advowson*. Br. Brief, pl. 359. cites S. P. Br. Brief, pl. 421. cites the Regis-

ter, fol. 229.—S. P. Br. Præcipe quod reddat, pl. 30. cites F. N. B. 217.—S. P. *Ibid.* pl. 31. cites Fitzh. Formedon 92. M. 16 E. 3. and 34. M. 14. E. 3.—S. P. Br. Demand, pl. 53. cites 9 H. 6.—S. P. Br. Præcipe quod reddat, pl. 10. cites 5 H. 7. 38. per Kebill, which Brook says seems good law; for the right of advowson lies of it, and yet in common recoveries for assurance of lands and tenements, it is used to put advowsons in those præcipes, viz. *in writs of entry in the post*.—But *ibid.* pl. 15. cites 20 E. 3. 15. contra, that it does lie of an advowson; per Fairfax, quod non negatur. But quære inde.

5. Nor of a *market*. Br. Præcipe quod reddat, pl. 31. cites Fitzh. Fine. 68. T. 13. E. 3.

6. If a man grants *pischary*, and the grantee has it *in severalty*, and is disseised and dies, the heir or successor shall have *writ of entry sur disseisin*. Br. Præcipe quod reddat, pl. 33. cites 13 E. 3. But Brooke says this seems not to be law.

7. Writ of entry ad terminum qui præteriit was admitted to lie of the *bedelay of the joke of Winchester*. Br. Præcipe quod reddat, pl. 32. cites 19 E. 3. & Fitzh. View 77.

8. *Writ of aye* was abated, because it was *bovat marisci*; for this does not lie in tillage. Br. Præcipe quod reddat, pl. 33.

9. Præcipe quod reddat was brought of the *office of serjeanty in the abbey of the borough of St. Peter*. Br. Præcipe quod reddat, pl. 3. cites the Register.

*Writ of es-  
fineage was  
brought a-  
gainst J. N.  
of three me-  
suages and the office of serjeant within the abbey of Westminster*; and by the best opinion the action does not lie of the office of another's possession; for the statute of Westminster 2, cap. 23. gives assise of cistovers, wood, and office of fee &c. of his own possession; but does not give action of another's possession by præcipe quod reddat. Br. Præcipe quod reddat, pl. 4. cites 7 H. 6. 8.

10. In debt it was said, and not denied but that a man shall have præcipe quod reddat of a *portion of land*; quod quære, unless he *shews the quantity*. Br. Brief, pl. 424. cites 11 H. 4. 40. —Br. Demand,

pl. 52. cites 11 H. 4. per Hill and Hank.—Br. Præcipe quod reddat, pl. 21. cites S. C. per Skrene; quod Hill. J. concessit. But Brook says, *Quære legem* at this day; for uncertain.

Præcipe quod reddat lies of a portion of land *cum pertinentiis*; per Hill and Hank. and not deny'd; quod nota bene. Br. Demand, pl. 24. cites S. C.

It lies of a *parcel of land containing so many feet*. Br. Demand, pl. 20. cites 5 H. 7. 9.—Br. Precipe quod reddat, pl. 23. cites S. C.

\* Garden is a good demand in præcipe quod reddat. Br. Demand, pl. 39. cites 5 E. 2. and Fitzh. Brief. 797.—It does not lie of a garden : nor of a *croft* nor *cottage*. Br. Precipe quod reddat, pl. 18. cites 8 H. 6. 3. per Babbington.—S. P. but Strange said he had seen a garden demanded by proper name. Br. Demand, pl. 8. cites 8 H. 6. 3.

Br. Demand, pl. 20. cites S. C. And per Hufsey and Fairfax, the chamber passes by grant without livery of seisin ; for no franktenement is in it, any more than in trees growing.

12. It lies of an *upper-chamber* ; per Rede ; and it was said that 21 H. 6. is contrary, and that it is not franktenement ; for it cannot continue ; for if the foundation perishes, the chamber is gone : and Hufsey and Fairfax agreed to it. Br. Precipe quod reddat, pl. 23. cites 5 H. 7. 9.

13. In trespass it was admitted that a *vill* may be recovered by præcipe quod reddat ; and so see that vill is a good demand. Br. Demand, pl. 20. cites 5 H. 7. 9.

[ 507 ] 14. It lies of a \* *gorce*, † *passage*, and ‡ *common*. Br. Precipe quod reddat, pl. 30. cites F. N. B. 191 & 217.

\* S. P. *ibid.* pl. 31. cites M. 13 E. 3. 57. and F. N. B. 12.—† *So of a passage ultra aquam*. Br. Precipe quod reddat, pl. 41. cites 6 E. 2.—‡ It does not lie of *common*, but quod permittat ; and the like of other *profits appendant* which lie in prender and not in render ; for at common law no *action* lies of profit appendant but a quod permittat ; and by the statute of Westminster, *assise* is given ; but by this, *writ of entry in nature of assise* is not given of it ; for this is præcipe quod reddat ; but assise lies by the common law of rent-charge and seck ; for those lie in render. Br. Precipe quod reddat, pl. 13. cites 4 Ed. 4. 1. per tot. Cur. except Assheton.

\* S. P. Br. Precipe quod reddat, pl. 31. cites F. N. B. 212.

15. *So of the \* profits of a mill*. Br. Precipe quod reddat, pl. 30. cites F. N. B. 217.

*So of the † bailiwick of the custody of the park of B.* Br. Precipe quod reddat, pl. 31. cites 7 E. 3. 63. and Fitzh. Entre 1.—† S. P. and yet properly a quod permittat lies of such thing. Br. Demand, pl. 43. cites 34 E. 1. and Fitzh. Brief. 855.

16. *So it lies well of the custody of a forest*. Br. Precipe quod reddat, pl. 1. cites 27 H. 8. 12. per Fitzherbert and Shelley J.

### (D) Place. In what Place it shall be brought.

S. P. Br. Precipe quod reddat, pl. 22. cites 8 E. 4. 6.

1. PRæcipe quod reddat shall be brought in a \* *vill or place known*, and not in a hamlet. Br. Precipe quod reddat, pl. 2. cites 34 H. 6. 1, 18.

per Cur.—\* S. P. Br. Precipe quod reddat, pl. 27. cites 34 H. 6. 18. per Laken ; but per Moyle, assise, dower and trespass may be brought in a hamlet. And Danby Justice agreed with Laken clearly.—† Precipe quod reddat does not lie in a hamlet, but only in a vill ; per tot. Cur. But note, where the

the land lies in the forest of Sherwood, or the like, which is out of any vill, quite tunc. Br. Precipe quod reddat, pl. 7. cites 9 E. 4. 36.

(E) *Seisin.* What is sufficient Seisin.

1. *Seisin in law* is sufficient to oust action if none abates. \* *As* S. P. per Yelverton; if my father dies seised, and none enters; quod nota. Br. Precipe quod reddat, pl. 5. cites 21 H. 6. 8. and F. N. B. tit. Dote unde nihil habet accordingly. for there is seisin in law in me, and precipe quod reddat may well be brought against me; but he said, if one abates, the writ shall be brought against him; for thereby he is tenant of the franktenement in fact. Br. Seisin, pl. 13. cites S. C.

2. *Lease for years* by A. to B. on condition to have fee; a precipe quod reddat was brought against A. and B. and held good, and not abateable for the doubt whether the condition should be performed. Pl. C. 482. b. in Case of Nichols v. Nichols.—cites 12 E. 2. Fitzh. Voucher 269.

(F) *Where Joint or Several. And Pleadings.*

1. **I** F a man gives land in tail or for life rendring rent, and the donee or lessee leases or discontinues to divers persons, the donor shall demand the rent by several præcipes quod reddat against them; per Thorp and Basset J. But per Herle anno 3, it shall be demanded against them in common; but per Basset and Thorp he may demand the whole rent against every tenant, or in proportion at his will, and he shall have several actions of wast against them. Br. Several Precipe, pl. 13. cites 22 Aff. 52. [ 508 ]

2. If 2 sons are co-heirs in gavelkind, and are disseised, and the one dies without issue, the other who survives shall have several actions, and not joint action. Br. Several Precipe, pl. 9. cites 24 E. 3. And the aunt and niece, of disseisin done to the aunt and sister,

ought to sever in action. Br. Several Precipe, pl. 9. cites 24 E. 3.

3. *Mortdancestor* against B. and his feme and one A. of a house in one summons, and of other tenements in another summons; the baron and feme said that they were tenants, and that A. had nothing, and vouch'd; and A. said, that he was sole tenant, and vouch'd; and the demandant as to the baron and feme stood the voucher; and as to A. where he had said that he was sole tenant, Priſt, that he was not; and the Court would not suffer him to have other answer; by which in right of this summons the writ was abated and stood for the remnant. Quod nota. Br. Several Precipe, pl. 2. cites 28 Aff. 25.

4. *Attaint* against B. and K. his feme and A. founded upon assise of novel disseisin. Finch. demanded judgment of the writ; for the summons is, Summoneas B. and K. his feme and A. as tenants in common, and B. and A. made default, and K. is received; he said, that those lands and others descended to K. and A. who made partition, and

and this land was allotted to K. &c. and so they are several tenants ; judgment of the writ, and therefore there ought to be several summonses, as in mortdancestor juris utrum &c. & non allocatur; for this is founded upon assise, in which writ several tenancy is no plea, nor here ; but otherwise it would be if one who was not party to the assise had been tenant. Br. Several Precipe, pl. 3. cites 50 Aff. 4.

5. Debt against three by joint præcipe and process issued till the one was outlaw'd, and after got pardon and demanded judgment of the writ, inasmuch as five were bound by obligation and two were left out. Norton said, the five are bound and every one in the whole, by which the writ was abated ; the reason seems to be inasmuch as all ought to be sued if he will have joint præcipe, and every one by himself may be sued by several præcipes. Br. Several Precipe, pl. 7. cites 12 H. 4. 18.

Br. Several  
Precipe, pl.  
18. cites 4  
H. 6. 14.

6. Præcipe quod reddat against two by several præcipes of several lands, the one appear'd and said that the one land and the other is all one land, and pleaded jointure, and the other for his part similiter ; the demandant said, protestando, that the one land and the other are not one, but divers, and maintained his writ, that the one is sole tenant of the one land, and the other sole tenant of the other land, and well ; for the matter above pleaded by the tenant is not double ; for the first matter is void, viz. to say that the one land and the other is all one ; for the one is a stranger to the several demand against the other ; for it is by several præcipes, which are in nature of 2 writs ; quod nota, per Cur. Br. Double &c. pl. 137. cites 4 H. 6. 15.

7. A man brought two formedons upon one and the same gift, as son and heir to one ancestor, and as cousin and heir to another ancestor, of moieties, and this seems to be by several præcipes in one and the same writ against one and the same tenant ; and the tenant was at issue upon the gift for both, and the jury came and were chose, sworn, and try'd upon the one, and were also chose, try'd, and sworn upon the other, because there are two divers originals, quod nota. Br. Several Precipe, pl. 4. cites 21 E. 4. 25.

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### (G) Pleadings.

1. **I**F a nief purchases land and marries the villein of another lord, and a stranger will purchase præcipe quod reddat against the nief and her baron, he need not to name the lord of the villein but the lord of the nief ; for the villein is not seised in jure proprio, but in jure uxoris. Br. Præcipe quod reddat, pl. 37. cites 15 E. 3.

Assise, and  
made plaint  
of a piece of  
land, con-  
taining 40  
scot in  
length, and  
28 in breadth,

2. In assise of mortdancestor, the writ was, Si obiit feifitus of eight feet of land in length, and six in breadth, and did not say the place or piece of land containing &c. and yet well. Quære in præcipe quod reddat. Br. Præcipe quod reddat, pl. 36. cites 16 E. 3.

and the assise was taken by default ; therefore quære. Br. Ibid. pl. 20. cites 14 Aff. 13.

3. The lessee for life of the lease of the King granted his estate to A. against whom N. brought præcipe quod reddat, and the first lessee dy'd pending the writ, and the tenant pleaded this matter, and so his estate determin'd, and franktenement devolv'd to the King; and the demandant could not deny it, by which the writ abated. Br. Præcipe quod reddat, pl. 6. cites 24 E. 3. 5. in the old Report.

4. If a man pending a præcipe quod reddat takes parcel of the land in lease for years, or takes execution of it by elegit &c. this is a good bar, during the term or execution. Br. Execution, pl. 57. cites 24 E. 3. 39.

*Quere, of taking of parcel in exchange or partition. Ibid.*

5. Præcipe quod reddat against two who vouch'd, and the vouchee enter'd into the warranty and pleaded, and after Belknap came and said that one of the first tenants who vouch'd was dead. Judgment of the writ, and therefore the writ was abated by award, notwithstanding the voucher. Br. Brief, pl. 60. cites 43 E. 3. 16.

6. Præcipe quod reddat, the tenant said, that there is another præcipe quod reddat pending by the same demandant of the same land; to which the \*defendant appeared, and after was effoign'd, and therefore the writ was abated by award; quod nota. Br. Brief, pl. 42. cites 40 E. 3. 35:

\*Orig. (defendant.)

7. Note per Paston, that if the defendant in præcipe quod reddat pleads a sufficient plea in bar, and traverses the title of the demandant, this plea is not double; for by the traverse the plea in bar is waived. Br. Double &c. pl. 11. cites 9 H. 6. 26.

8. Præcipe quod reddat of land in D. S. and W. the tenant demanded judgment of the writ; for all the lands are in D. *absque hoc*, that any part of it is in S. or W. and the demandant said that 100 acres are in D. and 100 acres in S. and the rest in W. and so to issue. Br. Brief, pl. 32. cites 34 H. 6. 45.

*It was said, that if a manor extends into four vills, and assise or præcipe quod reddat is*

brought of the manor in A. B. and C. it is a good plea that part extends into D. Judgment of the writ, because the demandant has not made foreprise; *quære inde*; for it seems, that he by this shall not recover, but only that which is in the three vills; and such gift by feoffment or fine shall give but only that which is in the three vills. Br. Præcipe quod reddat, pl. 12. cites 5 E. 4. 103.

In præcipe quod reddat of land in D. it is no plea that the land is in S. without traverse that it is in D. Br. Brief, pl. 216. cites 9 E. 4. 6.

9. It is a good plea in præcipe quod reddat in D. that there are two D.'s, *scilicet*, Over D. and Nether D. and none without addition. Judgment of the writ, by reason of the visne; per Brian and Vavisor. Br. Brief, Brian and Vavisor, pl. 324. cites 9 H. 7. 21.

10. A man may have præcipe quod reddat of one acre cover'd with water, or præcipe quod reddat generally of one acre of land, and each is good. Br. Præcipe quod reddat, pl. 11. cites 12 H. 3. 4. per Vavisor.

Br. Præcipe quod reddat, pl. 25. cites 3. C.

Pol. 156.

\* V. The King's rights, or the King's rights of his Crown, or the rights of the Crown; for so these which since are called prerogatives, before this time were called jura regia, or jura regia coronae, or jura coronae.

Bracton calls them privilegia regis; and Britton, droit le roy. But since the act of jus regni &c. has been commonly called prerogativa regis, which is all one with that which the act calls droit le roy. 2 Inst. 263, cap. 50.

The King's prerogative is part of the law of England, and comprehended within the same. 2 Inst. 496.

† Ibid. Trin. 4 & 5 P. & M. the Queen v. Ld. North. — Jenk. 216. pl. 60. S. C. and says, The servant of the Chancellor is answerable to the King for this debt; and so is the Chancellor, for he was obliged to keep it safely. — a Roll. R. 300. S. C. cited in Sir Edward Coke's Case. — S. C. cited by Hobart Ch. J. Godb. 295. in Sir Edward Coke's Case as in Dyer 161. the Lord North's Case.

It was found by office returnable in the Chancery, that R. received certain money of H. who was

attainted &c. by which the money belonged to the King, and that the said R. was seized of certain land after that he was debtor to the King, part in fee simple, and part for 20 years, and shewed who was tenant of the one, and who of the other; by which scire facias issued against the tenants, and the King had execution; and so see a case in action forfeited to the King. Br. Chafe en Action, pl. 10. cites 50 Aff. 5. Sir Hugh Spencer's Case, alias Green's Case. — Br. Charge, pl. 34. cites S. C. — Br. Prerogative, pl. 54. cites S. G.

## Prerogative of the King.

### (A) Prerogative of the King. *What Act will make a Man Debtor to the King.*

[1. IF the Chancellor of the augmentation takes an obligation to the use of the King, and delivers it to his servant to deliver it to his Clerk, who ought to have the custody, and the servant cancels it, the Master shall be charged for the obligation, because he had it to the use of the King, and therefore shall be bound to render it either to the King or to him who has the charge of it. † D. 4 & 5 Ma. 161. 45.]

2. If a man has a receiver who receives his rents, and after the lord is attainted of felony, and this receipt and attainder is found by office, the King shall have scire facias against the receiver to have the receipts; Brooke says, quære if the same law be not against tenants, and if the same law be not upon outlawries in trespasss. Br. Prerogative, pl. 136. cites 50 Aff. 5.

3. Executor was charged in account for monies received by testator out of the Exchequer by an insufficient warrant from the Lord Treasurer. Cro. E. 545. Hill. 39. Eliz. B. R. Dodington's Case.

4. C. being committed by the Court of Exchequer for non-performance of a decree, by which he was decreed to pay 32 l. 15 s. to a new corporation made by the Protector for the propagation of the gospel in New-England, which corporation had power to make collections for it; and having collected such sums of money

How

Now in the custody of such persons, they now came here by habeas corpus, and prayed to be discharged, because the *corporation is dissolved*, and they know not to whom to pay the money, and also because by the *general act of pardon* all contempts &c. are pardoned: but the Court held, that this *collection being for a public use*, the money belonged to the King, and that the King is now entitled to it, as well as to the money collected for the buying of impropriations, as was lately adjudged; and they doubted whether a person committed for not obeying a decree were pardoned; for the commitment of the party is the execution of the decree; and there is no other way of executing it. Et adjournatur. Hard. 192. Pasch. 13 Car. 2. in Scacc. [ 511 ] Chillenden's Case.

(B) Execution. To what Time it shall relate for Franktenement.

[1.] If a man becomes debtor to the King, being seised of land in fee, and after aliens this land, yet this land may be afterwards put in execution, tho' the *alienation was before any action commenced*; for it relates to the time that he became indebted to the King and after. 50 Ass. 5. adjudged. Co. 8. Sir Ger. Fleetwood, 171. 22 E. 1. Rot. Clauso Memb. 13.]

—If the King's debt be *prior on record*, it binds the lands of the debtor into whose hands soever they come; because it is *in nature of an original feudal charge on the land itself*, and therefore must subject every body that claims under it. Hist. View of the Court of Exchequer. 114.

[2.] If an officer accountant to the King *purchase land originally to him and his wife for her jointure, and to his own heirs*, this land shall not be charged during the life of the feme, nor the feme for the land. D. 5 El. 225. 33. adjudged.]

after the said jointure made. Trin. 5 Eliz. Sir William Sayntloo, alias Sir William Cavendish's Case. —Pl. C. 321. 9 & 10 Eliz. in the Case of Mines, cites S. C. but that for other lands of the said officer which he purchased at the same time after his being indebted, and which he did not take to himself and his wife, but let remain in the hands of others, the seizure of them was lawful by the common law; and says, that there were very many precedents in the Exchequer produced, that if any be accountant to the King, or if any money, or goods, or chattels personal of the King, come to the hands of a subject by matter of record or in fact, the land of such subject is charged for it, and subject to the seizure of the King, in whatsoever hands it after comes, be it by descent, purchase, or otherwise. —S. C. cited by Doderidge J. Godb. 292. in Sir Edward Coke's Case. —Jenk. 220. pl. 89; cites S. C. that the wife's jointure is not liable to this debt at common law; but by the statute of \* 13 Eliz. cap. 4. in the Cases of all the King's officers by receipt, as this treasurer was, all their lands are liable to the King's debts from the day on which they became such officers. —\* S. P. Jenk. 286. pl. 19.

[3.] If a man *seised in fee, upon his marriage, conveys it to the use of himself and his wife and to his heirs*, and this is for the *jointure of his wife, and after he becomes officer and accountant to the King*, and dies in arrear to the King, the feme shall not be charged for this land, in which she was jointly seised with her

Ibid. The Reporter makes a nota hoc; for the debt accrued after

If the lands were aliened in whole or in part, as by granting a jointure before the

*debt contracted, such alienance claims prior to the charge, and therefore is not subject to it. Hist. View of the Court of Exchequer. 114.—— See Pl. 2. and the Notes.*

her baron before he became officer to the King, with the said arrears. D. 5 El. 225. 32, 33.]

[4. If the plaintiff in an assise finds pledges, and after is amerced for his nonsuit, the land which he had the day of the pledges found shall be put in execution. 22 Ass. 32.]

Godb. 293. cites 24 B. 3 Rot. 4. Walter de Chirton's Case.

5. Debtor of the King purchases, but the estate is conveyed to another, but himself took the profits. The lands were seised. 11 Rep. 92. b. 93. Hill. 4 Jac. in the Earl of Devonshire's Case.

6. When lands are once liable to the payment of the King's debt, they are liable into whose hands soever they come. Godb. 297. cites D. 224, 225. Cavendish's Case.

2 Roll. R. 294. S. C. —S. C. cited Hob. 339. and says,

[ 12 ] that it was resolved to be subject to the debt by the common law, without averment of fraud under the inquisition, quæ terras & tenementa habuit.

7. The office of remembrancer and collector of the first fruits was granted to A. for life. Afterwards a grant was made to B. habend. to him after the death or surrender of A.—B. during the life of A. being seised of the lands in question, covenanted to stand seised thereof to the use of himself for life, and afterwards for 10 years to the covenantees for payment of his debts, and after to his first issue in tail male, and so to the 2d, 3d, &c. the reversion to his daughter and her heirs, with power of revocation. After this settlement A. dies, and B. exercises the office and dies, and upon account made with B.'s executors, it was found that he was in arrears 40,000 l. It was agreed by Doderidge J. Tanfield Ld. Ch. B. Hobart Ld. Ch. J. of C. B. and Ley Ld. Ch. J. of B. R. and decreed by Cranfield Master of the Court of Wards, and the whole Court, that the lands were liable to an extent, notwithstanding the power of revocation reserved in the said conveyance. Godb. 289. Pasch. 21 Jac. in the Court of Wards, Sir Edw. Coke's Case, als. Sir Christopher Hatton's Case.

### (C) Debt of the King executed. To what Time it shall relate.

This was the Case of Walter de Chirton. Trin. 24 E. 3. Rot. 4. in Scacc. and also of Favel.

Trin. 24 E. 3. Rot. 11. in Scacc.—Same Cases cited by Doderidge J. by the name of Favel's Case. Godb. 292. 293. in Sir Edward Coke's Case.

Same Cases cited 12 Rep. 2. 3. in Case of Ford v. Sheldon.—Same Cases cited by Doderidge J. the name of Thomas Savell's Case, and Walter de Chilton's Case. 2 Roll. R. 296. in Sir Edward Coke's Case.

[1. If a collector of a 15th alien his land, and dies without heir, process shall be made against *tertenants* to render debt to the King. D. 4. 5. Ma. 160. 41.]

[2. The same law, if he alien his goods and dies without executor, process shall be made against *possessors* of the goods, to render the debt. D. 4. 5. Ma. 160. 41.]

[3. If a farmer of the King doth not pay his farm, and the King recovers it in debt, his land which he had the day of the writ brought, and after into whose soever hands it comes, shall be put in execution. 19 H. 6. 38. b.]

Fol. 157.

(D) Debt of the King. Execution. To what Time it shall relate for *Chattels personal*.

See Forfeiture (R) —  
Utlawry.

[1. IF the King has execution against another upon his chattels, this shall not have relation for chattels personal to the time of the becoming indebted to the King. Co. 8. 171. *Sir Ger. Fleetwood*.] Pasch. 8 Jac.

[2. Nor to the time of the writ brought by the King. Co. 8. 171. Contra 19 H. 6. 38. b.]

[3. And the execution shall not have relation to the time of the judgment given for the King as to the putting in execution of chattels personal. For if they are sold bona fide before execution, they shall not be put in execution. Co. 8. 171.]

[4. But the execution of the King shall have relation to the execution awarded for the King for chattels personal; for by the award of the execution the goods are bound into whatsoever hands they shall come. Co. 8. 171.]

(E) Debt of the King. Execution. To what Time [ 513 ] it shall relate for *Chattels real*.

[1. THE execution shall not relate to the becoming indebted to the King as to the putting in execution chattels real. Co. 8. 171. *Sir Ger. Fleetwood*.]

[2. Nor to the writ purchased. Co. 8. 171.]

[3. Nor to the judgment given. Co. 8. 171.]

[4. But it shall relate to the award of the execution; for all chattels real which he had at the time of the execution awarded, shall be put in execution into whosoever hands they shall come. Co. 8. 171.]

[5. If baron and feme purchase land to them for years, and the baron is indebted to the King, and dies; this term shall be put in execution against the feme, because the baron had power to dispose of the term. 50 Ass. 5. adjudged. Co. 8. 171. (Quere this, for I do not see how this can be law, inasmuch as the execution does not relate.)]

6. A. had a term in gross, and then purchased the inheritance, and the term is declared to attend the inheritance; then A. becomes receiver of the King. A. is liable from the time of his becoming receiver, and the King shall have the benefit of the term; but if the term had been mortgaged to one that had no notice

of its attending the inheritance, he should hold it against the King. Mich. 1700. Chan. Prec. 125. How v. Nichol.

(F) Debt of the King. Execution. *Who may be charg'd for it.*

[1. **THE** *issue* shall not be charg'd for the debt of tenant by the *curtesy*, he having the land by his mother. 46 E. 3. 18. One *jointenant*, if he be debtor to the King, shall not charge the possession of the other. 40 Aff. 36.]

[2. The same law, tho' he has nothing who is the debtor. 40 Aff. 36. contra.]

Cited Comb.  
470. Hill.  
10 W. 3.  
B. R. in  
Case of  
Britton v.  
Cople.

[3. If the lord of a manor lose issues, being summoned upon a jury, process shall issue out of the Exchequer, to levy them upon the lands of the copyholders and lessees for life and years, parcel of the manor; for the loss of issues lies upon the land, as inherent servitude by the law, into whosoever hands it comes. M. 12 Ja. B. per Cur. agreed, and that it is the common practice of the Exchequer.]

[4. If the King grants a manor in which there are copyholders in fee farm, the lands or goods of the copyholders are not liable to the fee farm rent, tho' the franktenement is, because the copyholders are more ancient than the rent, being by prescription. 12 Ja. B. per Curiam.]

\* Fol. 158.

[5. If the King has a rent by prescription out of a manor in which there are copyholders, if the King has not used to levy it upon the copyholds,\* it seems that he cannot charge them, in as much as they are in by prescription also. Ma. 12 Ja. B.]

So for his  
fee farm.  
Ibid.—S. P.  
But this  
must be un-

[6. If a man holds of the King, and his rent is arrear, the King may distrain in his other lands and tenements held of others as well as of himself. Br. Prerogative, pl. 77. cites 44 E. 3. 45.]

[ 514 ]

derstood in such other lands as his tenant has in his own actual possession, and manured with his own beasts; and not in the possession of his lessee for life, years, or at will, for their beasts are not subject to such distress. 2 Inst. 132.—S. P. 4 Inst. 119.

S. P. But if the tenant aliens, devises or leases at will only his other lands, this prevents the Crown distraining on those lands. Hill. 1715. 2 Vern. 714. Attorney General v. Mayor of Coventry.

And the  
King may  
distrain in  
all the lands  
of his te-  
nant for his  
service; but  
his grantee  
shall not do so.  
And so see that in such cases the patentee of the King shall not enjoy the prerogative of the King, because he is a subject &c. Br. Prerogative, pl. 68. cites 13 E. 4. 5 & 6.

7. Note, that it was held that if the King has a rent-charge out of my land, he may distrain for it in all my land by his prerogative; but his grantee shall not do so. Br. Prerogative, pl. 68. cites 13 E. 4. 5 & 6.

8. The issue in tail shall not be charged for the debt of his father to the King; by the best opinion. Br. Prerogative, pl. 106. cites F. N. B. fol. 217.

9. The

9. The course of the Exchequer is, that if a man be in debt to the King by recognizance or otherwise, his heir shall not be charged if the executor has assets, and a feoffee that comes in by purchase shall not be charged, if the heir or executor has assets; for the heir and executor come in gratis. Per Manwood Ch. B. D. 67. b. pl. 20. Marg. 24 Eliz. Anon.

A. was lessee for years of the King rendering rent, and he assign'd his term to J. S. in trust for payment of

the debts of the said A. and after the debts were paid, J. S. resign'd it; but in the interim, between the assignment and the resignation, divers rents incur'd to the King; and the Barons agreed, that these arrearages in law may be levied upon the lands of J. S. notwithstanding the trust; but because the Court was informed that the executor of A. had assets, and continued farmer of the farm at that time, they compelled him to pay it; and being present in Court, they imprisoned him until payment made, and allowed him his remedy by English bill against J. S. because by the agreement J. S. was to have paid the rents to the King. Lane. 39 Pasch. 7 Jac. in the Exchequer.

10. After death of any debtor of the Queen, process shall issue against the executor, the heir and the tenants all together at one time; per Fanshaw remembrancer of the Queen, who said it was the course of the Court. Sav. 53. pl. 11. Pasch. 25 Eliz. in the Exchequer. Anon.

10. Cestuy que trust being indebted to the King, this trust shall be liable to the King's execution; and in the Case of SIR EDWARD COKE, the interest of the King's debt did attach upon the power of the King's debtor to revoke a settlement by him made of the estate, and P. 4 Jac. 1. FORD'S CASE, certain terms were taken in trust for a recusant, and held liable to the King's debt of 20l. per month; so that where the King's debtor hath the profitable part of the estate, the King shall not lose his debt by any fiction. 3 Ch. R. 35. 21 Car. 2. in Case of Att. Gen. v. Sir George Sands.

11. Lands of a jointress of the value of 500l. per ann. were extended for a debt prior to the jointure; and upon the inquisition taken were delivered in execution at a 5th part of the value; but decreed that the intrinsic value of the premises by the year shall be accounted for since the death of the husband, and be applied to the payment of the principal, interest and costs; and if not sufficient, the jointress to make it good; but if more than sufficient, then to repay to the jointress so much thereof as has been received since the death of her husband. Fin. R. 197. Hill. 27 Car. 2. Jacob v. Thacker,

But tenant in dower shall not be distrained for debt due to the King by the husband in his life-time, in the lands which he held in dower. 3 R. S. L. 13.

(G) Execution for Debt of the King. At what Time it may be, in what Cases when Common Person is to have him in Execution also. [ 515 ] See (M. 2) pl. 5.

[1.] If a man recovers in an action in which defendant is fined, if he be afterwards taken in execution for the fine, he ought first to be in execution to the party, if he will, before he shall be in execution to the King, because the King comes to the fine by the suit of the party. 7 H. 6. 7.] The damages and costs for the party shall be levied before the fine for the King only in decrees and popular actions; because here the prosecution of the party is the means by which

which the King comes to the fine; but let the prosecutor take care that he does not delay the levying of his costs &c. to the King's prejudice; for if he does, the execution of the King shall not wait. Jenk. 241. pl. 23.

The party grieved by suppressing a will was preferred in his remedy for his damages on an information in the Star-Chamber before the King for his fine. Nov. 104. Brereton v. Townsend.

S. P. D. 67.  
b. pl. 20.  
marg.—

S. P. B. because the King's debt is in nature of a feudal charge, which if it comes on the land before the property of them is altered, it seizes them as it might for the original service at first imposed;

but if there had been a lawful alienation of them before such debt, there it is not the feud of the tenant; and therefore such charge cannot affect it. Therefore if there were a precedent judgment or statute staple & liberate pursuant, before the King's extent comes down, it cannot charge the lands, because the property is altered by the extent of the subject which relates to the time of the judgment given. Hist. View of the Court of Exch. 115.

Note also, that the lien on the lands for the subject's debts is by stat. W. 2. for before that the judgment did not bind the land; but the King's debt bound the land before the statute. But the statute does not touch the King's prerogative. Hist. View of the Court of Exch. 116. 117.—\* But when they were actually delivered out to the officer by the liberate, they then no longer belong to the debtor, since the King's writ had delivered them over for satisfaction of a debt that was precedent to the King's; for the creditor did not take them under the burden of the King's debt, because his lien was antecedent to the King's debt; and it were repugnant to construe him to take the land sub onere of the King's debt, when he took it in satisfaction of a debt precedent, Hist. View of the Court of Exch. 117.

D. 197. pl. 44. Faich. 3 Eliz. Laffell's Case.

[3. If A. recovers debt against B. in B. and upon this a capias is directed to the sheriff to take B. in execution, and the sheriff takes him, and after, before the day of the return of the capias, a writ of prerogative issues out of the Exchequer against B. for 100l. debt due to the King, and this writ bears teste a day before B. was taken upon the capias ad satisfaciendum; in this case B. shall be in execution for the debt of the King, and also upon the said judgment of A. D. 3 El. 197. 44.]

For by the execution of lands or goods, the King may

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be prejudiced. Hob.

115. pl. 139.

[4. Tho' the debtor of the King be in execution by his body or his land for the King, yet the subject may also put or take him in execution by his body; for the statute of 25 E. 3. \* 13. (where it is said that the subject's execution shall cease till the King be satisfied,) is to be intended of execution by which the King seizes land or goods; but the body is all to all. Hob. R. Sherley's Case 160.]

S. C. cited Goob. 290. per Doderidge J. in

5. Two sued to have execution of a statute merchant, and the sheriff return'd that the one of them was dead; and the Court awarded that the other be received to sue alone, and he sued till now.

now, when the *sheriff* returned that he had extended the lands, but did not return that he has delivered it to the plaintiff; by which Belk. prayed that the sheriff be amerced; upon which came one for him who made the recognizance, and said that he was debtor of the King, and had writ out of the Chancery, rehearsing that he was debtor in the Exchequer, and prayed that execution cease till the debt of the King be levied. Belk. confess'd it, and prayed that process be continued in the roll till the debt of the King be levied; and so it was, and no *capias* issued &c. Fitzh. Execution, pl. 38. cites P. 41 E. 3.

Sir Edward Coke's Case. — Ibid. cites Pasch. 3 Eliz. D. 197. in Lord Dacres and Lassel's Case. — Ibid. cites D. 328. where the words of the writ of

privilege shew that the King is to be preferred.

6. A. being indebted to B. in 40l. to be paid by equal payments at two several days, and being bound for the payment thereof with two sureties, bargains and sells by indenture certain cattle, and for 40l. *pro manibus solut.* certain cattle &c. In the indenture, it was covenanted that if A. saved harmless the sureties from the penalty of the said obligation, then the bargain and sale should be void. Afterwards it was agreed that A. should use the cattle at the will of the sureties. Before the second day of payment A. kills himself, he not having paid any of the money, and the cattle being in his possession, it was adjudged that the almoner should have the beasts, or the money for which they were sold, but should discharge the sureties against the debt; per tot. Cur. contra Dyer. D. 160. b. Pasch. 4 & 5 Ph. & M. in the Star-Chamber. Anon.

7. A. acknowledged a statute to B. and afterwards A. acknowledged another to C. and afterwards C. assigned to J. S. who assigned to the Queen. After B. sued out execution of the land of A. and he has it extended and a liberate of it. It was agreed by all the Barons, that B. having execution before the Queen, his execution shall stand, and the Queen cannot put him out. 3 Le. 239. Curson's Case.

For these lands were never the lands of the Queen's debtor or assignor. Hist. View of the Court of Exche-

quer 118. — But if land had been extended at the suit of the Queen, then the Queen should hold place, although it were a statute of a puisne date. 3 Le. 240. Trin. 30 Eliz. S. C. by name of Hungeate v. Hall.

## (H) Execution for Debt of the King. The Prerogative of the King in Executions.

See Distress (K).

[1. 27 E. 1. Rot. *WRIT* to the archbishop to sequester bona ecclesiastica &c. who died, and this donec *suffic. securit. de debitis regis* &c.]

[2. If a man dies indebted to the King, the King may send to seize the goods of the deceased till satisfaction. 6 E. 1. Rot. Fin. Memb. 4. Command to seize a depositum in custody of the friars minors. 27 E. 1. Memb. 7. Writ to seize the goods of a sheriff upon his death, because indebted to the King. Memb. 4, 5. Upon death of any other being in debt to the King. 11 E. 1. Rot.

Rot. Fin. Memb. 5. *Accepta securitate of the executors for the debts of the King then licence to administer &c.]*

\* [3. 34 E. 1. Rot. Fin. Memb. 12. *de catallis archiepiscopi Cant. captis in manum regis quia indebted to the King, et catalla venditioni exponit unde rex de facili defrauded &c.]*

All debts to the King

[4. The King may seize the land of his debtor. 43 E. 3. 9. b.]

bind from the time the same are contracted; for the debts that were of record, always bound the lands and tenements, and the debts not of record, by the 33 H. 8. 39. bind as a statute staple; for all lands being held mediately or immediately from the King, when therefore any debt was recorded of any person, it laid the estate as liable to such debt as if it had been a reservation on the first patent; and therefore as the King could seize for the non-payment of the reserved rents, so he could seize the lands for any debt with which the lands were charged; but the Lord giving out any tenure for knight's service, or other service, could not seize for the non-performance of such service, as they did amongst foreign feudists, because the King had an interest in such service; for since the Baron was to come attended with so many knights, the King had an interest in the vassals who were to attend him; and therefore Lords are not permitted to seize the feuds of their tenants, but to distrain them for the service reserved. In the same manner, if a debt was recovered by the Lord in his Court-Baron, he could only order the bailiff to levy that debt by distress; but he had not the same remedy for the debt recovered in his Court, as he had for the rent annexed to the land; and therefore as the King, who had the eminent domain, could seize for the non-performance of the tenure, as the Lord of the feud had by the feudal law; so whenever he had charged a debt on his tenant, he had the same remedy as on an original reservation; and therefore the King, having a right to seize for the reservation, had likewise a right to seize for the debt; but the Lords having no more than a right to levy on the goods, and not a right to seize the land itself, the debt to the Lord did not bind the land as the debt of the King did, which subjected the lands to a seizure from the time it was on record; but goods were bound at common law from the teste of the writ, whether it was a *levari* or a *fieri facias*, because otherwise the debtors by alienation of the chattels might disappoint the executions of their Lords, who having by their process a right to distrain goods, there arose a lien on the goods from the time the *levari* was taken out; and the King's prerogative could not be less than the right of the subjects; and therefore bound the goods from the teste of the writ; but this was found inconvenient; and therefore by the 29 Car. 2. cap. 3. no execution shall bind the property of goods, but from the time of the delivery of the writ to the sheriff; vide tit. \* Execution, fol. 99. cap. 4. But this act seems not to extend to the King, for an extent of a later teste supercedes an execution of the goods by a former writ; because by the King's prerogative at common law, if there had been an execution at the subjects suit, and afterwards an extent, the execution was superceded till the extent was executed; because the publick ought to be preferred to the private property; and the rather, because the King is supposed by publick business not to be able to take care of every private affair relating to his revenues, and therefore no time occurs to the King; and if he was to be prevented of his execution by another person coming in before him, laches must be imputed to him, which the law does not allow, and since the King's debt is preferred in the execution, therefore an executor is obliged by the law to pay the King's debt on record, before debt on record to a subject. Hist. View of the Exch. 110, 111, 112, 113, 114. cap. 6.—\* This seems to refer to a MS. of the author's, and you may see S. P. at 2 New Abr. (published by Mr. Bacon) 363. tit. Execution (1).

[5. E. 1. Rot. Patent. Memb. 20. The King granted to a bishop, *quod possit condere testamentum of all his goods quæ non sunt episcopatus, & quod executores liberam habere possint administrationem &c.]*

\* Fol. 159.

[6. 8 E. 1. Rot. Patent. Memb. 27. The King granted to J. B. *quod quandocunque moreretur executores sui possint habere liberam administrationem de bonis suis ad debita ipsius Johannis solvend' & executionem testamenti faciendam, & quod de debitis, in quibus idem Johannes, nobis tenetur, ad heredes ipsius Johannis nos capiemus & non executores suos.]*

\* Viz. C. B.

— But the writ was disallowed. Ibid.—And 2 Le. 223.

[7. If a receiver of the King be impleaded in \* B. a writ of privilege may be granted out of the Exchequer, in which shall be recited the prerogative of the King, *quod a quibuscunque debitoribus nostris sunt debita nostra levare. & de bonis eorum solvend' priusquam creditoribus satisfac. &c.* and after a command [was] not to proceed in

in the plea, but that the plaintiff shall proceed against him in the Exchequer if he will &c. D. 15. 16 El. 328. 9.]

[8. If a man has judgment upon an obligation against A. who dies, and after another obligee of A. assigns his obligation to the King, the executor of A. may after satisfy the judgment before the debt of the King, inasmuch as the debt now due to the King was not of record before the death of the testator. Trin. 8 Ja. Scacc. per Curiam.]

9. The King's debtor brought a *quo minus* in the Exchequer against his debtor: the defendant appeared, and the plaintiff afterwards would have been nonsuit, but the Court would not suffer him so to be: and it was there said, that a release by the King's debtor unto his debtor would not discharge the King's debtor as to that debt; per Doderidge J. Godb. 291. cites Hill. 20 E. 3.

[518] In a *quo minus* in the Exchequer upon a debt upon a simple contract, the defendant cannot

wage *his law*; because the King is to have a benefit by the suit, although the King be no party to the suit. Godb. 291. per Doderidge J.—4 Rep. 95. b. in a Note of the Reporter, and cites 8 H. 5, Ley. 66. 20 E. 3. Ley. 52. 10 H. 7. 6.

10. Where the baron is indebted to the King, and he and his feme purchase land for 60 years, and he dies, the feme shall be charged. Br. Jointenants, pl. 30. cites 50 Aff. 5.

And yet if A. be indebted to the King, and A. and

B. purchase jointly in fee, and A. dies, and B. survives, he shall not be charged; note the diversity; for the other is only a chattel, all which the baron may alien without his feme. Br. Jointenants, pl. 30. cites 50 Aff. 5.

11. If a man is bound to two by an obligation, and the one is outlaw'd, and the King gets the obligation, he shall have action alone; for of an entire chattle the King shall not have a partner. Br. Forfeiture de terres, pl. 16. cites 19 H. 6. 47.

And if one of them is *sejo de se*, the obligation is forfeited to the

King after office thereof found. Ibid. pl. 58. cites 8 E. 4. 4.

12. If a bond be enter'd into to the Queen for payment of money, but not inroll'd in any Court, this debt shall be paid preferably to any debt due to a subject. And. 129, 130. pl. 176, Trin. 26 Eliz. Skroggs v. Gresham.

13. If A. recovers a debt in C. B. so as he has title to sue execution by elegit, and the defendant sells his lands, and afterwards A. assigns his execution to the Queen, she shall not have prerogative against the feoffee to have execution of the whole land but of a moiety only. Agreed per all the Batons. 3 Le. 239. in Curton's Case.

3 Le. 240. Trin. 32 Eliz. contra per Clark Barron. That all the lands should be extended

S. C. by name of Hungate v. Hall.—The prerogative of the Queen which makes it a feudal charge never affected these lands; for they became the lands of the feoffee before the defendant was indebted to the Queen, and so are subject to the same lien only as they were when it was only the debt of the defendant. Hist. View of the Court of Exch. 118.

A. confessed two judgments in debt upon bond to B. and was bound to J. S. in a bond bearing date before the judgments. J. S. assigned his debt to the King; afterwards B. sued out two elegits; by one he has the one moiety, and by the other the other moiety of A.'s lands extended; then process issued out of the Exchequer for the debt assigned by J. S. to the King. The questions were, 1<sup>st</sup>. If the King's debt should be preferred? And it was held that it should not; because here the subject's title is prior to the King's; otherwise where the King's debt is in equal degree; for there it shall be preferred, but not otherwise. Second question was, whether any of the lands are liable to the King's debt,

debt, in as much as B. had extended all the lands, whereas by his second elegit he ought to have taken but a moiety of a moiety? But this was held to be well, because the judgments being of the same term were of equal date, the term being but as one day in law; and judgment accordingly. Harb. 23. Mich. 1655. in the Exchequer. Attorney General v. Andrew.

14. Lands worth 40 l. per ann. were extended by conusee of a statute at 20 l. per ann. Afterwards the Queen, who was assignee of another conusee, by means of his being outlawed, sued out an extent of the over-value, which was found; and upon a scire facias to answer the surplussage to her, it was adjudged that the Queen has no such prerogative; and judgment was given for the first conusee. Cro. E. 265. Mich. 33 & 34 Eliz. B. R. The Queen v. Wall and Green.

15. If A. is indebted to the King and also to B. the King may protect A. from the execution (but not from the suit) of B. until the King's debt be satisfied, unless B. gives security to the King to pay him the debt of A. Jenk. 213. pl. 52.

The King by his prerogative regularly is to be preferred in payment of his duty or debt by his debtor, before any subject, although the King's debt or duty be the later; and the reason hereof is, because *thesaurus regis est fundamentum belli, & firmitatem pacis*; and thereupon the law gave the King remedy by writ of protection, to protect his debtor that he should not be sued or attached until he paid the King's debt; but hereof grew some inconvenience; for to delay other men of their suits, the King's debts were more slowly paid; and for remedy thereof it was enacted by the statute 25 E. 3. that the other creditors may have their actions against the King's debtor, and proceed to judgment, but not to execution, unless he will take upon him to pay the King's debt, and then he shall have execution against the King's debtor for both the debts. Co. Litt. 131. b. — But in some cases the subject shall be satisfied before the King; for regularly whenever the King is intitled to any fine or duty by the suit of the party, the party shall be first satisfied, as in a decies tantum; and so if in an action of debt the defendant denies his debt, and it is found against him, he shall pay a fine to the King, but the plaintiff shall be first satisfied, and so in all other like cases. And so it is in bills preferred by subjects in the Star-Chamber, their costs and damages (if any be) shall be answered before the King's fine, as it is daily in experience. Co. Litt. 131. b.

\* A. forged a customary of the services and customs of a manor to the prejudice of the Lord; this is a forgery of an interest within the statute 5 Eliz. 14. the party grieved shall have double costs and double damages, and upon judgment in this case in the Star-Chamber, these damages and costs shall be levied of the goods, chattels, and lands of the offender; and the fine laid on the offender for the King in this case shall wait till the damages and costs are levied for the party grieved. By all the Judges of England. Jenk. 241. pl. 23. cites 15 Eliz. D. 323.

See (F). (I) Execution for the King. *The Goods of whom shall be put in Execution.*

[1.] If a corporation be fined, the fine shall not be levied of the goods which every one has in special by himself, but of the goods which they have in right of the corporation. 9 H. 6. 36. b.]

Cro. E. 431.  
S. C.

[2.] The King may distrain the beasts of a stranger levant and couchant upon the land of his debtor, upon writ of *levari facias*. M. 37. 38 El. B. R. between Stafford and Bateman; per Popham. Hill. 8 Ja. Scacc. Richardson's Case.]

Cro. E. 431.  
S. C.

[3.] But he cannot sell those beasts of the stranger taken upon this writ as he may the beasts of the debtor himself. M. 37. 38 El. B. R. between Stafford and Bateman; per Popham. Hill. 8 Ja. Scacc. Richardson's Case, per Curiam. 1 Car. at Reading Term, between Dillon and Derby, adjudged upon demurrer.

This must be a mistake in the printer, or in those who

murder. But it was not averr'd (as I believe) that the beasts were levant and couchant.]

had the management of Roll's manuscript.

For the end of a levati facias is to have a sale; and therefore to allow they may be taken on a levati facias and not sold is a contradiction. 12 Mod. 178. Hill. 9 W. 3. in Case of Britton and Cole.—Skin. 619. S. C. and P.

[4. If two tenants in common are, and the one is indebted to the King, the King can not take the beasts of the other tenant in common going upon the land, and sell them for the debt; inasmuch as their going was lawful upon all the land. Hill. 8 Ja. Scacc. per Cur. Richardson's Case.]

S. P. and so is 2 Roll. Ab. 457. but, says the book, it will be otherwise for cattle that

come in by wrong on the land of the King's debtor, and are there levant and couchant. 12 Mod. 178. Britton and Cole.

[5. If the debtor of the King suffers A. to manure his land, the goods of A. may be seized by the King for the debt. M. 8 Ja. Scac. per Curiam. Brackenbury's Case.]

Lane 97. S. C. by name of Brockembury's Case.

6. If tenant of the King by rent &c. suffers arrears to incur, and after leases the land to another, the King may distrain the goods of the lessee in any place out of the land charged. But he cannot sell the distress; because non constat, whether the rent be due or not. M. 17 Ja. B. per Hub.]

[7. If the comsee of a statute dies intestate, and administration is granted to his feme who takes J. S. to baron, who becomes a debtor to the King, the chattles which J. S. has in right of his wife as administratrix, shall not be extended for this debt of the King; because those chattles are to pay debts &c. Pas. 20 Jac. Scac. between Buckler and Rogers, adjudged per Curiam, and such an extent quash'd for the cause aforesaid; and the Barons \* said, that it is the common course, and it was then said by Mr. Weston that such recognizance is not assignable to the King, and that this has been so ruled.]

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\* Fol. 160.

[8. All the goods of the debtor ought to be sold for the debt of the King, deductis necessariis sumptibus debitoris ad sola victualia hoc est necessitati non superfluitati & ut natura satisfaciatur, non crapula nec soli debitori sed uxori ejus & filiis & familie, qui prius exhibuerit dum sibi viveret & exceptis equis & armis of a knight; because it is not for his dignity to go on foot, and exceptis bobus & asinis earum. All this is in Ger. de Tilburie. 57. b. 58. See this at large and well explained there.]

[9. See Register Original, fo. 100. b. that it is not lawful to distrain propriam equitaturam, hoc est, the palfrey of a man, where he has other sufficient chattels to distrain. But it does not appear there for whom the distress was. Vide Selden, tit. of Honour, 321. says that this equitatura, is a horse which a man keeps for his journeying.]

10. A prior alien was indebted to the King for his farm-rent: and being sued for the same, he shewed, that there was a parson, who held a certain portion of tithes from him, which were part of the possessions of the same priory, which he kept in his hands, so

As he could not pay the King his farm-rent, unless he might have those tithes which were in the parson's hands. Wherefore a writ was awarded against the parson to appear in the Exchequer, and to shew cause why he should not pay the same to the King for the satisfying of the King's rent. And there Skipwith Justice said; that for any thing which toucheth the King, and may turn to his advantage, to hasten the King's business, that the Exchequer had jurisdiction of it, were it a thing spiritual or temporal. Godb. 291. per Doderidge J. cites 38 Aff. 20. and cites 12 E. 3. SWALD'S Case to the same purpose.

The King shall have the debt of the debtor to the King's debtor paid unto him; per Doderidge J.

11. The King may *distrain* for his debt due to him; and if a man be indebted to him who has tenants who owe him rent, he may make levy upon them, and this shall be a good bar for them against their Lord, who is debtor to the King, that they have paid it to the King by levy &c. And this levy is by prerogative. Br. Prerogative, pl. 39. cites 21 H. 7. 12. Godb. 290, 291. cites 21 H. 7. 12. the Abbot of RAMSEY'S Case.—As the Prior of Ramsey was indebted to the King, and another Prior was indebted to the Prior of Ramsey, and then it was pleaded in bar, that he had paid the same debt to the King, and the plea holden for a good plea. Godb. 290, 291. Pasch. 21 Jac. in Sir Edward Coke's Case.—S. C. cited by Doderidge J. 2 Roll. R. 295. in Sir Edward Coke's Case.—And 2 Roll. R. 297. in S. C. Tanfield Ch. B. agreed the Case of the Prior of Ramsey. 21 H. 7. 12 & 16. and said, that when he was a student, Dyer called for the record thereof in the Common Pleas, and the record is according to the book.

And if rent be due and payable unto me by my lease for years, the same may be taken for the King's debt, and the special matter shall be a good bar in an avowry for the rent. Godb. 291. cited by Doderidge J. as 38 E. 3. 28.

## [ 521 ] (I. 2) Lands of whom shall be put in Execution, Jointenants &c.

Br. Execution, pl. 148. cites S. C. —But where a lease is made

to the baron and feme for forty years, and the baron is indebted to the King, and dies within the term, the feme survives, and has the term; and the feme was charged by award notwithstanding the survivor, because it was only a chattel in the baron; and purchased to them before the coverture, and therefore execution was awarded against the feme by all the Justices. Quod quere if law. Br. Charge, pl. 34. cites 50 Aff. 5.—Br. Execution, pl. 148. cites S. C.

Vide (I) pl. 8. 9.—(M. 2) pl. 1. 4. 7.

## (K) What Things shall be put in Execution for the Debt of the King.

Ibid. cites Trin. 24 E. 3. Rot. 4. in the Exchequer. \* Walter de Chirton's Case.—

S. C. cited by Doderidge J. Godb. 293. in Sir Edward Coke's Case.—S. C. cited 12 Rep. 4. 5. 13

[1. IF a customer be indebted to the King, and has purchased with the King's money certain land, and by covin to defraud the King, caused the feoffor to enfeoff his friends in fee, and notwithstanding he himself takes the profits, this land shall be seized for this debt until &c. D. 4. 5. Ma. 160. 41.]

**in Case of Ford v. Sheldon.**—S. C. that his friends were infeoffed *not to his use, but upon confidence* between him and his friends *so that he might dispose thereof*, and therefore this land was extended; cited by Doderidge J. 2 Roll. R. 296. in Sir Edward Coke's Case as *Walter de Chilton's Case*.—S. C. cited by Tanfield Ch. B. 2 Roll. R. 287. as 24 E. 3. and says the reason is, because he might make disposition thereof; and when writ issues to the sheriff, it is to enquire of what lands *habuit vel feifitus fuit*, not *quas terras habuit & feifitus fuit*; for if he has to dispose, habuit, and then liable to the King.—S. P. Godb. 295. cited per Tanfield Ch. B. as adjudged 24 Elis. in *Morgan's Case*.—S. C. cited by Tanfield Ch. B. 2 Roll. R. 298. in Sir Edward Coke's Case.

2. A clerk of the Court was assign'd to receive monies for the King, who had *feoffees* of lands *to his use*: and the lands were found and seised for the King's monies, by force of the word (*habuit*.) Cited per Tanfield Ch. B. Godb. 294. Pasch. 21 Jac. in Sir Edward Coke's Case, as Mich. 30 H. 6. Rot.

S. C. cited by Tanfield Ch. B. 2 Roll. R. 297. in Sir Edward Coke's Case. —So the

*Sheriff* of a county being indebted to the King, his *feoffees* were chargeable to the King's debt by force of the word (*habuit*) for *habuit* the lands in his power. Cited per Tanfield Ch. B. Godb. 294. Pasch. 21 Jac. in Sir Edward Coke's Case as 34 H. 6. Philip Butler's Case.—And 6 E. 4. *Bowman's Case* accordingly.—S. C. cited per Tanfield Ch. B. 2 Roll. R. 297. in Sir Edward Coke's Case.—So a *widow* being indebted to the King, her *feoffees* were chargeable to pay the King's debt; because she had power of the land, it being found by inquisition that *habuit*. Cited per Tanfield Ch. B. Godb. 295. in Sir Edward Coke's Case as 34 H. 6. and cites 1 R. 3. accordingly.

3. B. an *officer of the Exchequer* had lands in the hands of *feoffees* upon trust, and a writ issued out, and the lands were extended for the debt of B. in the hands of his *feoffees*. Godb. 299. in Sir Edward Coke's Case, cited by Hobart Ch. J. as *Babington's Case*.

S. C. cited by Hobart Ch. J. 2 Roll. R. 304. in Sir Edward Coke's

*Case*.—So the *King's farmer* had *feoffees* to his use, and died indebted to the King; and upon an inquisition it was found that (*habuit*); for he had them in his possession, by compelling his *feoffees* by equity in Chancery; and therefore it was adjudg'd that the King should have the lands in the *feoffee's* hands in extent. Godb. 294. in Sir Edward Coke's Case, cited by Tanfield Ch. B. as 7 H. 6. in the Exchequer.—2 Roll. Rep. 297. in Sir Edward Coke's Case. S. C. cited by Tanfield Ch. B. as 17 H. 6.

4. D. having lands in other men's hands upon trusts, the lands were seised into the King's hands for a contempt (and not for debt or damages to the King). Cited per Hobart Ch. J. Godb. 299. in Sir Edward Coke's Case, as Sir Robert Dudley's Case. [ 522 ]

S. C. Cited per Hobart Ch. J. 2 Roll. R. 304. in

Sir Edward Coke's Case, as 7 Jac.

5: *Money* was levied by *Sheriff* upon a debt recovered by A. against B. which the sheriff did not deliver, but was ordered to be brought into Court till a difference that arose about it was determined. B. was indebted to the King, and a writ issued to inquire what goods &c. he had. The Court conceived that the money being but as a *depositum* there, they might find it; and the Court did not protect it from the inquisition, but would make no direction for the finding it. Vent. 221. Monk's Case.

6. A *copyhold* estate is not to be seised upon a recognizance. Per Holt Ch. J. Trin. 1 Ann. B. R. Farr. 38. Anon.

Vide (M. 2)  
pl. 3. par. 1.  
f. 30. 31.  
& pl. 6.

(L) *What Thing will be a Discharge of Land of the Debt of the King.*

Hob. 45.  
S. C. says,  
My Lord  
Ch. Baron  
[Tanfield]  
made a  
doubt of  
this, in re-  
spect (as he  
said) that he  
took the use  
of the Ex-  
chequer to  
be other-  
wise, except  
the King's  
patentee had  
the ordinary

[1. IF a receiver be indebted to the King for arrears of his receipts, and being seised of land in fee, conveys it in fee to J. S. who conveys it to the King in fee, and immediately retakes it of the King in fee, rendering a rent to the King in fee pro omnibus redditibus & servitiis, & omnibus clameis quibuscunque. In this case this land is not liable or extendible for this debt; for the land is not chargeable itself, but in respect of the person who is the debtor, as in case of a statute; so that when the King takes the land, the debt is not by this discharged, but may be recovered against the debtor himself. But the land in the hands of the King is not chargeable, and then when the King conveys it over, he cannot against his own conveyance charge the land. Hub. 63. *Sir William Fleetwood and Sir Roger Ashton's Case.*]

clause of covenant and grant to be discharged of all duties, debts and demands. And that therefore they all agreed, that their opinion in this case should be made up in the decree for the discharge of this land, without prejudice to the use of the Exchequer for the King's debt there.—S. C. Ley. 50. Pasch. 13 Jac. That it was resolved by the Lords Ch. J. Coke and Hobart, and the Lord Ch. B. Tanfield, that the land was not extendible, but discharged in law by the possession of the King; and decreed accordingly.

\* Hob. 46.  
In S. C. of  
Fleetwood  
v. Sir Roger  
Ashton.

[2. If a receiver be in debt to the King, and the King releases to the tenant of the land, which the receiver had after he was debtor to the King, [\* all rights and titles,] this does not discharge the land; for the land is not charged but in respect of the person. for the debt does not give any right in the land. Hub. 63.]

3. By 27 Eliz. cap. 3. f. 8. If the accountant or debtor had a quietus est in his life-time, that shall discharge the heir of the debt.

(M) Debt of the King. *How Execution may be*

Prynne's  
Cott. Rec.  
Abr. 40.  
No. 45.

[1. Rot. Parl. 17 E. 3. THE Commons pray, that in case a man be found in the Exchequer debtor to the King, in case the King be in his debt, that by use of equity if he please that the one debt may be rebated in the other, as heretofore has been used, and is contained in the statute of the said Exchequer, and that due allowances of ancient debts pardoned be allowed. Answer of the King, The King will be advised \* to ease his people in the best manner that he can.]

[ 523 ]  
\* Orig. is,  
De fairer  
lease a son  
people que il  
purra bonement.

It was re-  
solved per  
Cur. that  
this branch  
extends to

2. 33 H. 8. cap. 39. f. 32. enacts, That if any manors, lands &c. shall be chargeable with the payment of such debts, and shall be in the seisin and possession of divers persons other than the obligators, then all the said manors, lands &c. and every parcel shall be wholly and

and intirely, and in no wise severally liable and chargeable with payment of the said debts.

all executions for debts to the King, as

well at the common law as upon this statute, and that all shall be equally extended by force of this branch, according to the purview of this act. 7 Rep. 21. b. in Sir Thomas Cecil's Case.

A debt came to the Queen by attainder of the creditor, upon which an extent issued against one of the ten-tenants, liable to the debt, and not against all; it was moved, that upon a branch of the said statute all the ten-tenants ought to be charged. But it was the opinion of divers, that such a debt which cometh to the King by attainder, is not within the said statute; for although the attainder is by judgment, yet debt by judgment it cannot properly be said, but where a debt is recovered by judgment. And that was the Case of the Lord Norris, for a debt due to Heron by the Lord Williams, which Heron was attained. 2 Le. 33. pl. 39. 31 Eliz. The Lord Cromwell's Case.

## (M. 2) Statutes relating to Debts of the King.

By 9 H. 3. *THE King nor his bailiffs shall levy any debts upon lands or rents so long as the debtor hath goods and chattels to satisfy, neither shall the \*pledges be distrained so long as the principal is sufficient; but if he fail, then shall the pledges answer the debt, howbeit they shall have the debtor's lands and rents until they be satisfied, unless he can acquit himself against the pledges.*

By order of the common law, the King for his debt had execution of the body, lands and goods of his

debtor; this is an act of grace, and restrains the power that the King before had. 2 Inst. 19.

\* It was resolved by the Court, that this act does not extend, nor was ever taken to extend to sureties in a bond or recognizance, if they may be so call'd, being bound themselves equally with the principal, as sureties to perform covenants and agreements are in like manner; but to pledges and manucaptors only, who by express words are not responsible, unless their principals become insolvent, and so are conditional debtors only. And so the act has always been construed, and the words themselves imply as much. Hard. 373. Mich. 16 Car. 2. Attorney General v. Resby.

2. By 9 H. 3. cap. 18. *The King's debtors dying, the King shall be served before the executor.*

By this statute, the King by his prerogative

shall be preferr'd in satisfaction of his debt by the executors before any other. And if the executors have sufficient to pay the King's debt, the heir nor any purchaser of his lands shall not be charged. 2 Inst. 32.

3. West. 1. 3 E. 1. cap. 19. enacts, *That the sheriff having received the King's \* debt, upon his next account shall discharge the debtor thereof, in pain to forfeit three times so much to the debtor, and to make fine at the King's will.*

\* Under this word [debitum] all things due to the King are

comprehended, and not only debts in their proper sense, but duties or things due, as rents, fines, issues, amercements, and other duties to the King received or levied by the sheriff; for debt in its large sense signifies whatsoever a man doth owe; and debere dicitur quia deest habere; debitori enim deest quod habet, cum sit creditoris, maxime in casu domini regis. 2 Inst. 198.

*The sheriff and his \* heirs shall answer all monies that they whom he employed do receive; and if any other that is answerable to the Exchequer by his own hands do so, he shall render thrice so much to the plaintiff, and make fine as before.*

\* This is to be understood quoad restitutionem but not quoad penam

; that is for the civil but not for the criminal part; for it is a maxim in law, Penam ex delicto defuncti heredes tenent non debet; and again In restitutionem non in penam heredes succedunt. 2 Inst. 198.

*Upon payment of the King's debt, the sheriff shall give a tally to the debtor, and the process for levying the same shall be shewed him upon demand without fee, on pain to be grievously punished.*

Vide (K).

4. 28 E. 1. cap. 12. enacts, *That beasts of the plough shall not be distrained for the King's debts so long as others may be found, upon such pain as is elsewhere ordained by statute, (viz.) by the statute de districtione scaccarii. 51 H. 3.*

This is an act of grace, and upon this act there lies a writ directed

*The great distresses shall not be taken for his debts, nor driven too far; and if the debtor can find convenient surety, the distress shall in the mean time be released; and he that does otherwise, shall be grievously punished.*

ed to the sheriff, commanding him to receive surety according to this act, which if he refuse, an attachment lies against him, or the party offering surety, according to this act, if it be refused, may have an action against the sheriff &c. 2 Inst. 565.

See (G).—For otherwise, if without giving such security, the party takes forth execution upon his judgment, and levies the money, the same money may be seized upon to satisfy the King's debt; per Doderidge J. Godb. 290. cites 45 E. 3. Decies tantum. 12.

5. 25 E. 3. Stat. 5. cap. 19. enables a common person to sue a debtor of his (who is likewise indebted to the King) to judgment, but he cannot proceed to execution, unless the plaintiff gives security to pay the King's debt first, and then he may take execution for his own and the King's debt too.

See (Y. c. 4).—None other is to be charged, but such as were liable to the bond when it was made; per Shute. Sav. 10 Pasch. 22 Eliz. Parker's Case.

6. 33 H. 8. cap. 39. f. 2. enacts, *That all obligations and specialties concerning the King and his heirs, or made to his or their use, shall be made to his Highness and to his heirs, Kings, in his or their name or names, by these words, Domino Regi, and to no other person to his use, and to be paid to his Highness by these words, Solvend' eidem domino regi hared' vel executoribus suis, with other words used in common obligations, which obligations and specialties shall be in the nature of a statute-staple.*

An obligation for performance of covenants is within this act, after that the covenants are broken. Resolved, 7 Rep. 20. b. Mich. 39 & 40 Eliz. in the Exchequer, in Sir Tho's Cecil's Case.—S. C. cited Hard. 368. Pasch. 16 Car. 2. in Case of the Attorney General v. Waring.—S. C. cited Hard. 442. Pasch. 19 Car. 2. in Case of Attorney General v. Sir Henry Palmer.

S. 3. *All such obligations, the debt not being paid, shall come, remain, and be to the heirs or executors of the King as he shall assign or appoint. And if any person take any obligation to the use of the King or his heirs, otherwise than as aforesaid, he shall suffer such imprisonment as shall be adjudg'd by the King or his honourable council.*

S. 6. *Costs and damages are given to the King.*

See (Q. 6).

S. 7. *Directs debts to be sued for in the proper courts.*

See (Q. 6).

S. 13. *And every of the said courts are impowered to sit such fines, penalties and amercements, upon parties, sheriffs officers and other persons, for their defaults, contempts, negligences or misdemeanors, as to the said respective courts shall seem expedient. And all trials in the said several courts shall be by due examination of witnesses, writings, proofs, or such other ways as by the said several courts shall be thought expedient.*

S. 25. And in all actions and suits in any of the courts aforesaid for any debt due to the King, by reason of any attainder, outlawry, forfeiture, gift of the party, or by any other collateral ways or means, it shall be sufficient in law to shew and alledge generally, that the party to whom the said debt did belong, such a year and day did give the same to the King, or was attainted, outlaw'd &c. whereby the said debt did accrue to the King, shall be of the same force and effect as if the whole matter had been alledged and declared at large according to the order of the common law. See (Q).

S. 26. If any suit be commenced or taken, or any process be hereafter awarded for the King, for the recovery of any of the King's debts, that then the same suit and process shall be preferred before any person or persons. (2) And that our said sovereign Lord, his heirs and successors, shall have first execution against any defendant or defendants, of and for his said debts, before any person or persons; \* so always that the King's suit be taken and commenced, or process awarded for the said debt, at the suit of our said sovereign Lord the King, his heirs or successors, before judgment given for the said other person or persons. This Statute abridges the prerogative and controls the common law; and here is a negative implied per Baron Parker and Nicholas, S. P. tho'

the statute sounds in the affirmative; for it enacts a new thing, and the *ita quod* makes a condition precedent and a limitation. And Steele Ch. B. accordingly, and the words are introductory. Hard. 27. Mich. 1655. in Scacc. The Attorney General v. Andrew.

\* Strange arg. said, That upon this act he took it, the suit must be said to be then taken or commenced when the first step is made towards the proceeding to execution; and the first step to be taken is to procure a fiat of a Baron, and then it is in fact that the process is awarded. G. Equ. R. 222. Hill. 12 Geo. 1. in Scacc. in Case of the King v. Mann.

S. 27. All manors, lands, tenements, possessions and hereditaments, the which now be, or that hereafter shall come or be, in, or to the hands, possession, occupation, or seisin of any person or persons, to whom the said manors &c. have heretofore, or hereafter shall descend, revert or remain in fee-simple or in fee-tail, general or special, by, from or after the death of any his or their ancestor or ancestors as heir, or by gift of his ancestors whose heir he is, which said ancestor or ancestors was, is, or shall be \* indebted to the King or to any person or persons to his use, by judgment, recognizance, obligation or other specialty, the debt whereof is or shall not be contented and paid; † that then in every such case the same ‡ manors &c. shall be and stand by authority of this act, from henceforth charged and chargeable to and for the payment of the same debt, and of every part thereof. See (P). — A. seised of the manor of O. in 1000. Consideration of a marriage to be had between B. his son and M. daughter of J. S. contracted to pay a fine, to the use of himself and his wife for their lives, remainder

to the use of B. and M. and the heirs of their bodies with remainders over. Afterwards A. acknowledged a recognizance to the Queen and died. His wife died. The manor is extended for the Queen's debt, by force of the statute. It was argued by Coke, that the manor is not chargeable by the said statute; that it was made for the King's benefit in 2 points. 1. To make lands intail'd liable for the King's debts where they were not so before against the issue. 2. To make bonds taken by the officers of the King to the use of the King as also of statutes; that the words (*was or shall be indebted*) shall not be intended after the gift made; that (*shall be*) is to be intended of future debts after the statute, whereas at the time of the settlement A. was not receiver or other officer to the Queen; the words are (*by gift after the debt acknowledged to the Queen.*) That this Case is not within the statute; for the words are (*of the gift of his ancestor*) but here B. had not the manor of the gift of A. but rather by the statute of uses, and so he is in the post and not in the per by his ancestor; for the fine was levied to divers persons to the uses aforesaid, nor was the gift a mere gratuity but in consideration that he should marry the daughter of J. S. and the debt accrued not till after the gift. He admitted that had there been any fraud in the case, or any purpose in A. when

*be made the conveyance to become the King's debtor or officer; it would be within the statute; and the gift had been a mere gratuity &c. And afterwards (as Coke reported) B. and his lands were discharged. 2 Le. 90, 91. pl. 114. Mich. 29 Eliz. in the Exchequer. Fokew's Case.*

\* This is intended an immediate debt, and not such debts as are due to the subject and appertain or accrue to the King by † attainder, outlawry, forfeiture, gift of the party, or by any other collateral way or means; for which this statute has a clause a little before this branch for the writ and general manner and form of pleading in such cases of the part of the King for the recovery of them, That the party *such a year and day &c.* [which see at §. 25. above] so that the several manners of pawning these two branches manifest the intention of the makers of the act to prefer immediate debts due to the King by judgment &c. before debts of the subjects which accrue to the King by assignment, attainder, outlawry &c. and the reason was, because debts due immediately to the King by judgment, recognizance, obligation, or other specialty, are in their nature more high, and may be better known, and upon search found than debts due to subjects. Resolved, 7 Rep. 22. a. in Lord Anderfon's Case.

† S. P. But for such debts the King is left at common law. If the King's debtor, officer or accountant has *leases for years or goods*; these leases and goods are not liable if the said debtor sold them bona fide: but if he sold them by *covert* it is otherwise. If land be purchased with the King's money, it is liable to satisfy the King. Jenk. 226. pl. 99.

The debt ought to be immediately to the King himself, or if it be to any other than to the King, it ought to be originally to the use of the King. 7 Rep. 22. a.

It was resolved, that if tenant in tail becomes indebted to the King by receipt of monies of the King or otherwise, unless it be by judgment, recognizance, obligation or other specialty and dies, the lands in the seisin of the issue in tail by force of this act shall not be extended by this act for such debt; for the statute extends only to the said four cases, and all other debts remain at common law, 7 Rep. 22. b. Trin. 41 Eliz. in Scacc. in Lord Anderfon's Case.

§ The issue in tail the land being in his hands is also liable in either of the said 4 cases, [ 526 ] but not the bona fide alienee of the issue; for the words of the statute do not extend to this alienee. The common law did not help the King in these cases; the statute helps the King in the said cases against the issue in tail. Jenk. 226. pl. 99.—S. P. Ibid. 285. pl. 19.

The issue in tail shall not be charged by this statute for the penalty, upon a conviction of recufancy of the tenant in tail by proclamation, by the statute 28 Eliz. But otherwise it had been if he had been convicted by the 23 Eliz. 1 Roll. R. 94. Mich. 22 Jac. B. R. in Case of the King v. Doctor Foster.—Cites it as resolved. Mich. 39 & 40 Eliz.

† By the exprefs purview of this act, the land shall be solely extended as long as it is in the possession or seisin of the heir in tail; for this act says, that in every such case the land shall be charged. And in as much as the land against the issue in tail was not extendable before this act, the King has benefit to extend it in the possession of the heir in tail which he could not do before; but the King cannot extend the lands of the alienee; for the statute does not extend to this, and the makers of the act have reason to favour the purchasers, farmers &c. of the heir in tail, more than the heir himself; for they are strangers to the debts of the tenant in tail, and they come to the land bona fide, and upon good consideration. Resolved, 7 Rep. 22. b. Trin. 41 Eliz. in Scacc. in Lord Anderfon's Case.

† If the goods and chattels of the King's debtors be sufficient, and so can be made appear to the sheriff, whereupon he may levy the King's debt, then ought not the sheriff to extend the lands and tenements of the debtor or of his heir, or of any purchaser or tertenant. 2 Inst. 19.

Sec (P).—

By this clause the intent of the makers of the act appear that the heir in tail shall be

only charged with the debt of the King; but lands in fee simple were extendable at the common law in whosesoever hands they came, and therefore as to them this statute was only declarativum antiqui juris: but as to the estates in tail, it was introductivum novi juris against the issue in tail. Resolved, 7 Rep. 22. b. Trin. 41 Eliz. in Scacc. in Lord Anderfon's Case.

One P. was indebted to the Queen, and one W. was bound to P. in 100l. in which obligation W. did not mention his heirs; P. assigned the obligation in which W. was bound to him to the Queen, and upon this process was made against the heir of W. And it was held by the Court, that inasmuch as W. did not oblige himself and his heirs, that the heir by the death of the father was discharged: and if the assignment had been made in the life of the father, and then the father had died, the heir should be discharged, but the son may be charged as executor or administrator &c. Sav. a. Fash. 22 Eliz. Warren's Case.

§. 28. *The King shall not be excluded to demand his debts against any of his subjects, as heir to any person indebted to his Highness or to his use, albeit this word heir be not comprised in such recognizance or specialty, or that such persons shall say, that they have not any hereditaments to them descended, but only such as be entailed or given to them by the ancestors.*

*S. 29. Provided that the King may at his liberty demand his debts of any executors or administrators of any person indebted if the executors &c. have assets.* See (P) and in the note to S. C. pl. 28. infra.—J. S. was

obliged to Sir Richard Cavendish, late Treasurer of the Chamber to King H. 8. in 1601. who was indebted to the King, upon which process was made against those who were tenants of the said J. S. tempore confiscationis scripti prec. made to the said Sir Richard. per Manwood Ch. B. The tenants are not chargeable in this case, but the heirs and executors. Per Shute 2d Baron, If obligation be made to the King it shall be of the same nature as a statute staple to all intents by this statute; but obligations made to other persons to the use of the King, shall be executory against the obligor, his heirs, executors or administrators, and not against other persons. But if J. N. be bound to J. S. and J. S. assigns this to Sir Richard Cavendish, and he over to the King, no process shall be made thereupon, which the Court and all the Clerks agreed. And it was held, that if obligor, after the obligation made, voluntarily makes feoffment of lands, such feoffees shall be charged, otherwise it is of purchasers before the obligation made in Case of the King. Sav. 12. pl. 33. Patch. 21 Eliz. Anon.

*S. 30. If the said hereditaments shall be evicted out of the possession of such persons by just title without fraud, whose hereditaments shall not be chargeable as is aforesaid; then all such hereditaments shall be acquitted of the same debts.* See (L).—B. was indebted to the Queen, for the payment of

which debt certain lands, which were the lands of the said B. at the time of the said debt, were purchased by one W. against whom and one C. and D. the said B. exhibited his bill in the Exchequer Chamber, praying that the equity of the case might there be examined. Before any answer made W. paid the debt, and then demanded judgment if the Court would hold further plea inasmuch as the cause of the privilege was determined, which is the debt due to the Queen. And it was held by the Court, that upon this reason the Court ought to dismiss the cause, and so it was done. Sav. 15. pl. 39. Patch. 22 Eliz. Sir Thomas Ragland v. Wildgoose.—S. C. Ibid. 11. pl. 27.

*S. 31. If any person of whom any such debt shall be demanded, shew in any of the said courts \*sufficient matter in law, reason or † good conscience, why such persons ought not to be charged with the same, and the matter so shewed † be sufficiently proved, the said courts shall have power to allow the proof, and acquit all persons so impleaded, any thing in this act to the contrary notwithstanding.* [ 527 ] See (L). \* This proviso does not give benefit only to him who has matter in good con-

science, but also to him who has good, perfect and sufficient cause and matter in law, reason (and then comes) good conscience; and without question the first words, viz. cause and matter in law shall extend to all the debts of the King, and process thereupon as well at common law as upon this act. And the conclusion of the said branch does not make against it. For the sense thereof was, that he should plead matter in law or good conscience, and that nothing contained in the said act should be an impediment thereto. Resolv'd per Cur. 7 Rep. 19. b. Mich. 39 & 40 Eliz. in Sir Tho. Cecil's Case

Scire facias issued against Sir W. H. as heir to M. H. his father, upon a recognizance acknowledged to King E. 6. by the said M. H. The sheriff returned scire feci, and upon his default judgment was given. And because in truth he never was summoned, and had good matter, if he had had notice thereof, to plead in discharge of the recognizance, because he had no land by descent from his father, nor any land from him after the recognizance acknowledged, all which he shew'd in certain in a bill in English in the Exchequer Chamber; upon which, upon conference had by Manwood and the other Barons with the two Ch. J. he was discharged of the said recognizance. 7 Rep. 20. a. in Sir Tho's Cecil's Case.—as 3 Rep. Trin. 37 Eliz. Sir William Herbert's Case.

+ A. obtained of the King a privy seal, whereby the forfeiture of certain recognizances for appearing at the sessions, amounting in the whole to 800l. was granted to her. And it was now made a question, whether the Court might compound those forfeitures by virtue of their privy seal, which was granted before the privy seal, and grant to A? And it was doubted whether the said privy seal did not take away and revoke the power given to the Court in this particular? But it was held clearly per Cur. that the Court might upon good matter in equity discharge these debts by virtue of this statute. And the case in question seem'd a hard case to the Court, because the party himself was the cause why there was no appearance by beating the party so heinously the very day before they ought to have appeared that they were disabled thereby to appear. Hard. 334. Mich. 15 Car. 2. in Scacc. Mrs. Ashe's Case.

W. put 100l. out at interest to the defendant, and took bond in the name of one T. who became seile de se, and now the plaintiff was relieved against the King upon this trust in equity upon this

statute. Sed quære, whether this statute extends to any equity against the King, otherwise than in case of pleas by way of discharge? But it is likewise observed in this cause, that the plaintiff should be saved harmless from all others. Hard. 126. Hill. 12 & 13 Car. 2. Sir William Hix v. the Attorney General and Sir Wm. Cooper.

† Scire facias issued against T. the father, and T. the son, to shew cause wherefore they did not pay to the King 1000l. for the mean profits of certain lands holden by them from his Majesty, for which land judgment was given for him in the Exchequer, and the mesne rates were found by inquisition, which returned that the said mesne profits came to 1000l. upon which inquisition this scire facias issued; whereupon the sheriff returned that T. the father was dead; and T. the son now appeared, and pleaded that he took the profits but as a servant to his father, and by his command, and rendered an account to his father for the said profits, and also the judgment for the said land was given against his father and him for default of sufficient pleading, and not for the truth of the fact; and he shewed this statute, which he pretended aided him for his equity; whereupon the King demurred. Tanfield Ch. B. said, That the matter in equity ought to be sufficiently proved, and here is nothing but the allegation of the party and the demurrer of Mr. Attorney for the King; and if the demurrer be in law an admittance of the allegation, and so a sufficient proof within the statute, it is to be advised upon; and for that point the case is but this: a scire facias issues out of this Court to have execution of a recognizance, which within this act ought by pretence and allegation of the defendant to be discharged for matter in equity, and the defendant pleads his matter in equity, and the King supposing this not to be equity within this statute, demurs in law, whether that demurrer be an insufficient proof of the allegation within the statute or not? Adjournatur. Lang 51. Pasch. 7 Jac. in the Exchequer. Tallois's Case.

S. 33. *This act shall not take away any liberties belonging to the duchy and county palatine of Lancaster.*

S. 34. *Processes and executions for debts in the Court of Exchequer shall be made in the Exchequer by such officer as hath been used, as by this act is limited.*

The Queen by her letters patents, granted *causilla utilitatis* & *felorum de se*, within such a precinct. One who was in-

7. Stat. 13 Eliz. cap. 4. s. 1. enacts, That all the lands, tenements and hereditaments, which any accountant of the Queen, her heirs and successors, hath while he remains accountable, shall for the payment of the debts of the Queen her heirs and successors be liable, and put in execution in like manner as if such accountant had stood bound by writing obligatory (having the effect of the statute-staple) to her Majesty, her heirs and successors, for payment of the same.

[ 528 ] *debted to the Queen in fide de se within the precinct.* It was the opinion of all the Barons, and so ruled, that notwithstanding the grant by the said letters patents, the Queen shall have the goods for satisfying her debt. 3 Le. 113. pl. 101. Hill. 26 Eliz. in the Exchequer. Anon — Mo. 126, 127, S. C. between the QUEEN AND BISHOP OF SARUM AND COXHEAD, and there per Manwood Ch. B. the patent does not extend to have the goods of felo de se against the Queen for her debt, because it wanted the words (*licet tangat nos*;) but he agreed, that if the lands of the felon be liable [insufficient to answer] all the debt of the Queen, the Court may in discretion take all the lands in extent, and leave the goods to the patentee. And as to a petition of Coxhead praying a discharge of the lands &c. by him purchased of the officer debtor to the Queen, it was answered, that the land was subject to the Queen's extent for all arrears of account by his office received before the conveyance thereof, though the receipt be after the conveyance, and that by reason of this statute; but as to another office accepted after the conveyance of the land, the arrears of that shall not charge the land so conveyed.

B. L. having purchased a long term for years in the Lamb Inn, and of other houses in St. Clement's parish, afterwards purchased the inheritance; afterwards he became receiver of North Wales, and having occasion for 500l. assigned over the term by way of mortgage to J. S. Afterwards on the marriage of E. L. his son, bequeathed the houses in St. Clement's (inter alia) on himself for life, remainder to E. L. his son, and the heirs of his body. There was issue of the marriage a daughter, now the wife of P. After this B. L. mortgages these houses to N. for 1000l. The King extends these houses for the debt of B. L. — N. gets an assignment of the extent, and a pivity seal for the debt. Resolved, first, That by the statute of Queen Eliz. the land and real estate of B. L. was bound and stood liable to answer the King's debt, although he was not actually a debtor to the King, nor any extent against him in several years after. — Secondly, That where a term is attendant on the inheritance, if the King gives us the inheritance, he shall have a right to the term; but it is a term in gross, and assigned before any actual extent, the assignment will stand good, and the term not liable to the King's debt. 2 Vern. 387, 390. Mich. 1700. in Capc. Nicholls v. How, and Porter, & al. &c contra.

S. 2, 3. *If this super be not paid within 6 months after the account past, the Queen &c. may sell so much of his estate as will answer the debt, and the overplus of the sale is to be rendered to the accountant or his heirs, by the officer that receives the purchase-money, without further warrant.*

Upon this statute divers doubts and questions were moved. 1st, If the debtor died, whe-

ther the land might be sold? 2dly, When the account is determined after his death? 3dly, When the accountant after his becoming debtor, and in arrearages makes *scrolement*, or other estate over, or charges or incumbers the land, either to his issue or others of his blood to prevent the Queen's selling, or upon other consideration, whether she may sell the land, the words of the act being *make sale &c. of so much of the lands &c. of every such accountant or debtor so found in arrearages &c.* And that the sale shall be good and available in law against the party accountant, and his heirs claiming as heirs. 4thly, If the accountant was seised of land in tail, whether this land might be sold to be good against the issue; for the ousting of which doubts the statute 27 Eliz. cap. 3. was made, but this gives remedy only, that the land shall be sold after the death of the debtor, and when the account is made after his death, and therefore to remedy the other mischief, the statute 29 Eliz. cap. 7. was made. [But the same being only a temporary act is expired.] Mo. 646. 84. pl. 895. Anon. [where part of the said last mentioned act is set forth and explained.]

S. 5. *If such accountant or debtor purchase lands in others names in trust for their use, that being found by office or inquisition, those lands also shall be liable to satisfy the debt in such manner as before is expressed.*

S. 6. *Lands purchased by accountants since the beginning of the Queen's reign, either in their own names, or in the names of others in trust for their use, shall be also liable to be sold for the discharge of their debts as aforesaid, rendering the overplus to the accountant as before.*

S. 9. *Provided, that bishops lands shall be only chargeable for subsidies or tenths, as they were before the making of this act, and not otherwise.*

S. 10. *Neither shall this act extend to charge any accountant whose yearly receipt exceeds not 300l. otherwise than as he was lawfully chargeable before this act.*

S. 11, 12. *Neither shall this act extend to such accountants as by order of their offices, and charge, immediately after their accounts past, are to lay out money again; such as are the treasurers of war, garisons, navy, provision of victuals, or for fortifications or buildings, and the master of the wardrobe; unless the Queen &c. command present pay.*

S. 13. *Neither doth this act extend to sheriffs, escheators or bailiffs of liberties, concerning whose accounts the course remains the same that it was before.* [ 529 ]

S. 14. *Lands bought of an accountant bona fide, and without notice of any fraudulent intent in the accountant, shall be discharged; and if they be found by office, yet shall they upon traverse be discharged without livery, ouster le main, or other suit.*

If a man is a receiver to the King, and is not indebted, but is clear,

and sells his land, and ceases to be receiver, and afterwards is appointed to be receiver again, and then a debt is contracted with the King, the former sale is good. Arg. 2 Mod. 247. Trin. 29 Car. 2. in Scacc. Attorney General v. Alton.

S. 15. *The Queen &c. being satisfied by sale of land, the sureties shall be discharged for so much, and if any yet remain unpaid, the sureties shall pay the residue ratably according to their abilities.*

8. By 27 Eliz. cap. 3. s. 2. the Queen &c. may make sale of the accomptant's lands &c. as well after his death as in his life-time, and as well where the accompt is made and the debt known within 8 years after his death, as where the accompt is made and the debt known in his life-time.

S. 3. Provided, that after the accomptant's death, and before the lands be sold, a scire facias shall be awarded to garnish the heirs, to shew cause why lands &c. should not be sold &c. whereupon if the heir, upon such garnishment or to two nichils returned, do not prove unto the Court, that the executors or administrators of the accomptant have sufficient, then ten months after such two nichils or garnishment returned, the lands &c. shall be sold and disposed according to the statute of 13 Eliz. 4.

S. 4. Nevertheless, the heir's sale bona fide upon good consideration before the scire facias awarded, shall be good to him that is not consenting to defraud the Queen &c.

S. 5. This statute shall extend to all officers of receipts and accompts to her Majesty and to no other.

S. 6. If the debt grow in the courts of the dutchy or wards, a privy seal shall issue out against the heir to appear at a certain day, to shew cause &c. When, if he appears not, upon affidavit made that it was duly served, an attachment with proclamation shall issue out against him, to be proclaimed in some open market in the county where he dwelt 20 days (at least) before the return thereof, whereupon if he appears not, the lands &c. shall be sold and disposed as aforesaid.

S. 7. The heir's lands shall not be sold during his minority; but at any time within 8 years after his full age, they shall be liable as aforesaid.

### (M. 3) Extent in Aid. In the King's Name.

1. IF the King sues his debtor in the Exchequer, the defendant may surmise that J. S. has part of his goods by which he cannot satisfy, and there process shall go against the said J. S. ad respondendum tam nobis quam defendenti. Br. Prerogative, pl. 88. cites 38 Aff. 20.

A surmer of  
curse, hav-  
ing estate  
sufficient to  
satisfy his  
debt to the  
King, takes  
out an ex-  
tent in aid

2. Where a debtor of the King is sufficient, there a debt due to him ought not to be assigned to the King, but only where the debt is doubtful, and that was the ancient course; but now many are thought rich that are not, and therefore omnis ratio tentanda est to recover the debts of the King; per Manwood Ch. B. 2 Le. 31. Mich. 31 Eliz. in Bridget's Clerk's Case.

against a debtor of his that had failed. Per Jeffries C. decreed, that he refund with costs, calling it an oppression and a trick to defeat other creditors. Vern. 469. Trin. 1687. Capel v. Brewer.—Cited Ch. Prec. 155. Pasch. 1701.—Cited 2 Vern. 426. Pasch. 1701. in Case of Brown v. Trant.—Court of Chancery will not examine the quantum of the King's debt due on an extent, nor how far extent sued out are necessary; but where defendant who sued out an extent in aid confesses by his answer, that he has sufficient estate of his own to pay the King's debt, as

[ 530 ] in the Case of CAPEL V. BREWER, or where it appears to be a fraudulent contrivance

trivance to gain a preference to a debt of an inferior nature, it will relieve as in Case of *CHOLMEY v. STUART*, cited 2 Vern. 426. Pasch. 1701.—Cited Ch. Prec. 155. Pasch. 1701.

3. A. for debt extended the lands of B. Then D. to extend the lands of B. for his own debt, and to have the lands out of the hands of A. (by recognizance) *acknowledges himself to be indebted to the King's* auditors. For which debt of D. the lands of B. were extended and taken out of the hands of A. In this case D. for *abusing the prerogative* of the King was censured in the Star-Chamber. Noy. 154. Widow Dobbin's Case.

4. *Obligor gives a judgment* to the obliges for his debt; afterwards an extent was taken for the King on the said bond. The extent is void, because the *bond transivit in rem judicatam*, and profits taken on such extent are relievable. Chan. R. 107. 12 Car. 1. Tryon v. Michel.

5. A. was indebted to the King, and B. was indebted to A. and C. to B. The debt due from C. may be seized to satisfy the King's debt, this being a debt in the third degree only, but no debt in a more remote degree is liable. But as for satisfying debts owing to the King's debtor, it would be extremely inconvenient to go so far; for at the rate, if A. were indebted to the King in 100 l. and B. indebted to A. in 1000 l. and C. indebted to B. in 10000 l. these several debtors should have the benefit of the King's prerogative against the lands, and for recovery of their several debts. But there would be no inconvenience if the King's own debt were so levied, tho' in the 10th degree; for then his prerogative would be exerted for the satisfying of his own debt only; and there is no question but the King's own debt may be so levied. But to make the King's prerogative a stale to satisfy other mens debts would be unreasonable, inconvenient and mischievous to the subject; and so it is declared by the privy seal made in 12 Jac. Per Hale Ch. B. Hard. 404. Pasch. 17 Car. 2. in the Exchequer. The Attorney General v. Poultney & al.

6. A. was indebted to the King. B. was bound for A. and paid the money. A. became a bankrupt, and the King's debt is satisfied afterwards; then B. prays in aid, and an extent is had, and by order of the Exchequer the money levied upon the extent paid to B. and if B. shall detain this money against the rest of the creditors is the question. Holt said, the extent was before the bankruptcy, and then being a prerogative case it is good; nay, if it were after an act of bankruptcy it would for the King over-reach the bankruptcy, and be good against the creditors; he cited Dy. 96. but the Court was of opinion against him, and gave judgment for the plaintiff upon a special verdict. Skin. 162. Hill. 35 & 36 Car. 2. B. R. Jefferies v. Williams.

If an extent for the King of the goods of a bankrupt comes before the assignment of the bankrupt's estate, it must be preferred, because till then the property is not vested.  
2 Show.  
480. Trin.

2 Jac. B. R. Attorney General v. Capel & al.—Ibid. 481. cites a Case in the Exchequer. 20 Car. 2. Attorney General v. Hanbury and Lewis.

The King's receiver takes out an extent in aid against his own debtor, against whom a commission of bankruptcy was before awarded. The assignees bring a bill in Chancery to set aside the extent in aid, and after 14 years suit the bill was dismissed; for that it was proper only for the Exchequer being the Court of the King's revenue and which was first possessed of the cause, and therefore only examinable

examinarable there; and should it be set aside here, yet the King would not be concluded by it in the Exchequer; for till the account be discharged there, that Court may carry on the process. Ch. Prec. 153. Pasch. 1701. *Brown v. Bradshaw*.

The Reporter says, that not long before the Court had relieved Alderman **STUART** in [ 531 ] Case of such extent. But adds a quere, wherein this case differs from that, otherwise than that there the creditors were plaintiffs, and here the executor was. *Ibid.* 48.

7. A. was indebted to B. C. and D. by several bonds, and to J. S. by simple contract. A. died, leaving W. R. his executor. — B. got judgment on his bond against W. R. — J. S. being the King's receiver took out an extent in aid against himself, and has this simple contract debt found; and upon a seire facias against W. R. had judgment thereupon in the Exchequer. Whereupon W. R. sued in Chancery, suggesting fraud &c. and that this extent was not prosecuted by the King, but by W. R. himself, and at his own charges, and that he was not really indebted to the King at the time, though the bond was kept on foot, or that if he was indebted, he was able to pay, and so the King's debt not in danger. In his answer W. R. pleaded these proceedings in bar, and confessed that he prosecuted it at his own charges, and that he was able to pay the King at the time of the extent. The Court allowed the plea. Chan. Prec. 47. Trin. 1692. *Dickinson v. Molineux*.

8. Rules concerning extents in aid. Decemb. 4th, 1721. MS. Tab. Yale v. the King.

### (M. 4) Account. In what Cases.

And if the King grants land for life, and does not say without rendering any thing for the same, he shall render the profits; per Catesby. Br. Patents, pl. 109. cites 2 H. 7. 6. — So of a ward granted. *Ibid.* — But the case of the grant of land \* for life, or years, or in tail, was denied, and that of the ward agreed. *Ibid.*

1. IF the King grants a bailiwick or shrievalty to J. S. without account to be rendered, the words (without account) are not good; for this is contrary to the nature of the thing granted. Br. Patents, pl. 99. cites 36 H. 8.

\* He shall neither render farm, nor rent, nor shall he account to the King. Br. Patents, pl. 50. cites 3 H. 7. 12. — But otherwise it is of ward; for there he shall answer to the King. *Ibid.* — So of sheriff of a county; for he is the committee of the King; and all this was said for law. *Ibid.*

2. The King granted to H. Earl of Northampton the shrievalty of the county of Northampton, and the office of sheriff for term of his life, to have, occupy and exercise that office, and all other offices belonging to the sheriff in the county aforesaid, by himself or his sufficient deputy \* rendering therefore to the King and his heirs annually 100 l. at his Exchequer, without any other account to be render'd or made thereof to the King. And it was held, that because the issues and profits of the county were not granted to him, that therefore he shall account, and that where the King grants as above, without any account to us to be rendered, and does not say to us or our heirs to be rendered, the heir of the King shall have account for it; for in this case the law implies account. As where the King grants to a man commission of all manner of pleas in

\* Br. Patents, pl. 107. cites S. C. where it was held by Brian and Catesby, that these words, (rendering 100 l.) shall be intended for the office and not for the profits, and that therefore he

*In-B. out of the King's Courts*, that is to say, *extra Curiam Regis*, and does not say *extra Curiam Regis & hæredum suorum*; for it is not the Court of the King, but only during the life of the King, and after it is the Court of the Heir of the King, that is to say, of the new King who is not express'd in the grant; *quod nota*. And so see that the matter of this case rests upon these words, *without account to us to be render'd*, where (*heirs*) is wanting, and upon those words *extra curiam nostram*, and does not say, & *hæredum nostrorum*. For where the King grants *fair, market, warren, consuance of pleas &c. to a man and his heirs*, tho' the King does not grant it for him and his heirs, yet the grant is good in fee; for tho' the King has no fee in them, but creates them by his grant; yet the King is † inabled by his prerogative to grant them, and therefore the grantee has fee, *without the words Heirs of the King*; and so note a diversity. Br. Patents, pl. 45. cites 2 H. 7. 6.

shall account for the profits; but Brooke makes a quere; but by all except Brian and Caesby, the grantee shall not account as sheriff in this case, but of green wax. † Orig. (inherit.)

3. *Bailiff of the King shall be charged by his occupation*, though he be not assigned bailiff; per Brian Ch. J. Br. Bailie, pl. 25. cites 4 H. 7. 6.

If the King has bailiff by parcel, and not by

record, he cannot compel him to account; but if information be thereof sent into the Exchequer, he shall account. Br. Surmise, pl. 31. cites 15 H. 7. 17. per Vavisor.

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4. J. K. son and heir of J. K. was brought into the Exchequer to answer to the Queen for a certain sum of money by him received of the abbot of F. to pay to the abbot of C. who was attainted of treason; and a bill was shewn unsealed, made by the abbot of F. to the abbot of C. upon which the defendant demurred in law; and because it was only a *chose en action*, and a naked contract upon the matter, he was discharged. Sav. 40. pl. 91. Mich. 24 & 25 Eliz. in Scacc. Kitchin's Case.

(N) King. Account. In what Cases he may have an Account. *Against what Person. Party himself.*

Fol. 161.

[ 1. ] *Any man takes the goods of the King*, the King may have an account against him. Co. 11. Count. Devon. 90.]

S. P. Mo. 476. Arg. Mich. 39 & 40 Eliz. in

Case of the Queen v. Doddington.—If a man intermeddles with the King's treasure, (the King pre-tending a title to it), he shall be chargeable for the same to the King. Godb. 291. in Sir Edward Coke's Case.—Cites 11 Rep. 89. Earl of Devon's Case.

[ 2. So where a man enters by tort into the land of the King. The King may charge him in account. Co. 11. 99.]

S. P. 10 Rep. 114. b.—He who gets livery out of

the hands of the King, who ought not to have livery, shall answer the issues to the King. Br. Issues Ret. pl. 19.

*Tenant of the King dies seised*, and J. N. abates in part of the tenements; the heir of the abator shall be charged with the issues of it, and not the heir. Br. Issues Ret. pl. 20. cites 12 R. 2. and Fitzh. Livery 28.

[ 3. If

S. C. cited  
Godb. 291.  
292. Paich.  
21 Jac. in  
Sir Edward  
Coke's  
Case.

[3. If the *master of the ordnance, by colour of his office, takes the broken ordnance as his vailes*, where they are not due, and converts them to his use, he may be charged in account. For tho' he claims them to his use, yet the law makes a privy. Co. 11. Count. Devon. 90.]

[4. If goods are devised to the King, into whosoever hands they come, the possessor shall be charged in account; for the King is not driven to his action of trespass. Co. 11. 90.]

S. C. cited  
by Doderidge.  
Godb. 292.  
Paich. 21  
Jac. in  
Sir Edward  
Coke's  
Case.

[5. If an officer of the King receive for his lawful expences the treasure of the King to his own use, yet if he receives it without lawful warrant, he knowing that it was the treasure of the King, the law makes privy in case of the King, and for this he may charge him in account. Co. 11. Sir Walter Mildmay. 92. b.]

S. C. cited by Doderidge J. 2 Roll. R. 296. in Sir Edward Coke's Case.

[6. Or, in this case, the King may charge him who made the unlawful warrant at his election. Co. 11. 92. b.]

S. C. cited  
by Doderidge J.  
Godb. 292.  
Paich. 21  
Jac. in  
Sir Edward  
Coke's  
Case.

[7. If a man presents another to the King as a sufficient officer &c. and offers to be mainpinner for him, but is not accepted; if the officer be after in debt to the King for his office, the presenter of him may be charged in account, because he was the means of the loss of the King. Co. 11. Walwaine 92. b. (but quere this.)

Ibid. 296. S. C. cited by Hobart Ch. J. and says the body and goods of the officer were delivered as in execution to repay him the money which the King had levied upon him. — S. C. cited by Hobart Ch. J. 2 Roll. R. 300, 301. in Sir Edward Coke's Case.

[ 533 ] 8. Where a patent is repealed, because it was of a market, and was to the nuisance of the other market, and therefore it is repealed for such cause or other such cause, by which the King loses the profits, [yet] the party shall answer him of mesne profits, quod nota. Br. Issues Ret. pl. 3. cites 11 H. 4. 6.

9. Sir William Pelham was surveyor of the ordnance, and delivered the money of the King to Painter clerk of the ordnance. It was holden in this case, that for the said money the Queen might have accompt against Painter, although there wanted a privy, which cannot be so in case of a common person; for if my receiver make one his deputy, I shall not have an accompt against him. 4 Le. 32. 33 Eliz. in the Exchequer. The Queen v. Painter.

10. If one of the Exchequer lend unto another 500 l. of the Queen's money, and takes a bond for it in his own name, yet the Queen shall have an accompt against the borrower; per Popham attorney-general. 4 Le. 32. 33 Eliz. in the Exchequer. The Queen v. Painter.

11. If one by letters patents, or by virtue of his office, has power to assess fines upon grants or admittances made to copyholders within the King's manor, and he assesses small fines for the Queen, and under hand takes great sums or other rewards of the copyholders to his own use, in disceit and prejudice of the King; in this

this case he may be charged to the King in account for all; for in truth all was due to the King. 11 Rep. 90. b. Hill. 4 Jac. in the E. of Devonshire's Case.

12. At common law, account lay against any who had the land of the King's debtor, if he had not bought it bona fide. Jenk. 226. pl. 99.

(O) *How it shall be brought, and by what Name.*

[1. **T**HE King is not bound to charge the defendant in account as bailiff, or receiver, as common person ought; but he may allege in his information generally, that he *ad computum domino regi reddendum tempore mortis sue tenebatur* in such a sum of money due to the King &c. Co. 11. Count. of Devon. 90. b.] S. P. Godb. 291. Pasch. 21 Jac. in Sir Ed. ward Coke's Case.

(P) *Against whom it lies. Against Executors [or Heirs.]*

[1. **T**HE King may charge an executor in an account by his prerogative. Litt. Co. 11. Count. de Devon. 90.] Ibid. 98. b. cites it as the Case of Cary and

Doddington executors of Sir Walter Mildmay.—Mo. 476. S. C. by name of the Queen v. Doddington. Adjournatur.

The \* King shall have action of account against the executors of a receiver; contra of a common person; for he shall not have such action against executors. Br. Prerogative. pl. 116. cites Litt. tit. Homage, Fealty and Escuage.—\* S. P. Because the law there maketh a privy, it being found by matter of record, that the testator was indebted to the King, which record cannot be denied. But in the case of a common person, account will not lie for want of privy. Per Doderidge J. Godb. 291. Pasch. 21 Jac. in Sir Edward Coke's Case.—S. P. Per Doderidge J. 2 Roll. R. 295. in S. C.

[2. *Where the testator might be charged as guardian in socage, bailly or receiver, there the King may charge the executors, for this is an account.* Co. 11. 89. b.]

[3. *So where the King could not charge the testator ordinarily, viz. as guardian, bailiff or receiver; but by his prerogative, yet the King shall have an account against the executor.* Co. 11. 89. b. 90.]

[4. *As if the master of the ordnance takes, claiming to his own use, the broken ordnance of the King, as appertaining to his office, and dies, the executor may be charged in account, because for the King account would lie against testator by prerogative without privy.* Co. 11. 90.] [534.] S. C. cited by Doderidge J. Godb. 291. 292. Pasch. 21 Jac. in Sir Edward Coke's Case.

Sir Edward Coke's Case.—S. C. cited by Hobart Ch. J. 2 Roll. R. 300. in Sir Edward Coke's Case.

[5. 3 E. 1. Rot. Fin. Memb. 33. *The heir of a sheriff shall be charged to account in Scacc. &c.*]

[6. 1 E. 1. Rot. Pat. Memb. 18. *The heir of the Justice of Chester charged to account &c.*]

Fol. 162.

[7. 2 E.

If any officer be indebted unto the King, and dies, the course of the Exchequer is to call in his executors, or the heir, or the tertenants to answer the debt, and if he has no lands, then a writ issues out of the Exchequer to know what goods he had, and to whose hands they be come. Per Tanfield Ch. B. Godb. 294. Pasch. 21 Jac. in Sir Edward Coke's Case.

(Q.) Account by the King. Against whom it lies.  
*Against Tertenants.*

S. P. Per  
Tanfield  
Ch. B.  
Godb. 294.  
Pasch. 21  
Jac. in Sir  
Edward  
Coke's  
Case.

[1. **A**N account lies for the King against the tertenants of J. S. who was an officer accountant to the King, after his death (there not being heir or executor as the sheriff returned) to render account for the arrear due to the King for his office, from the time that he became officer till his death, tho' no judgment was given against J. S. in his life, of any debt of account of his office, and tho' the tertenants are not privy to his reckonings. D. 5 El. 224. 32. Demurrer.]

Br. Prerog.  
in pl. 137.  
Brooke  
seems of  
opinion that  
the tertenants  
are  
chargeable.

[2. But there it is said that upon search there were found divers precedents that such process have been made by the prerogative of the King against tertenants, ad computandum, and some have been compelled to account, and some have pleaded pardons and releases; and at the end of the said case, a pardon is obtained.]

[3. In Fitz. N. B. tit. Ident. Nominis. fol. 268. A. in the end of the writ, it is said, *Processum debitum versus prefatum J. S. (who was an officer) si superstes sit vel hered. & executor. Seu tennentiarum & tenementorum ipsius J. S. si mortuus fuerit, tenentes juxta juris exigent faciant &c.*]

(Q. 2) Debts owing by the King, and Subsidies &c.  
assign'd for Payment. *What Remedy for the same  
against the Collectors and their Executors &c.  
And Pleadings.*

Tenths and  
fifteenths  
are granted  
to the King  
to be paid at  
certain days,  
the King  
makes an  
[ 535 ]  
assignment  
of part of  
these fifteenths  
to his creditors;  
the King makes

1. **T**HE clergy granted to King R. 3. a tenth to be paid at two days, and the collectors were assign'd by the bishop, and the King assigned divers tallies to his debtors of it, some at the first day, and some at the second day, who shewed their tallies to the collectors before the day of payment, and the King died after the first day and before the second day, and the collectors had not collected any thing. And it was held that the power of the collector is not determined by the death of the King; for they are appointed by the bishop and not by the King; and they should have collected after the death of the King: and therefore by all the Justices, the collectors shall be charged to the debtors, and not to the new King; and to the second payment by assignment of the King, and by shewing of the

the tallies by the debtors to the collectors, the collectors shall be charged, and the King is discharged; and after the shewing the tallies to the collectors, the King cannot pardon the collectors nor the clergy of the payment of it; for the debt is to the creditors now, and not to the King; quod nota; as rent granted. Br. Quinzime, pl. 7. cites 1 H. 7. 8.

collectors of these fifteenths, and the convocation makes a collector of the tenths; the creditors

give them notice of these assignments. If the creditors die after the day for payment, and after notice of the assignment, the collectors are liable for all that is assign'd, altho' they have not received any part thereof; for it was not their fault that they had not collected them. If a collector dies before the day of payment, he is answerable only for so much as he has received. If a collector dies after day of payment, his executor shall answer for the whole, if he has assets, or for so much as the assets amount to; if after a collector's death his executor collects any of them, he is liable pro tanto. And tho' he had no power to collect, he is liable to account to the King, and so is every one who meddles with the King's right. A King who is an usurper makes such assignment, it shall bind the rightful King. A tally, according to the use of the Exchequer, is sufficient for such assignment. Jenk. 167. pl. 21.

(Q. 3) Joinder in Action. In what Cases the King and a common Person shall join in actions. See Forfeiture (R).

1. THE King assign'd in Chancery to a woman his tenant's widow dowable of a fair held in capite, a rent issuing out of it, and afterwards granted the fair to A. in fee. A. did not pay this rent to the widow according to the assignment; she brought a scire facias in her own and the King's name against the said A. for the said rent, and did not mention in the scire facias how much of the rent was arrear. This scire facias was brought into the Exchequer. The plaintiff had judgment affirm'd in error. Jenk. 14. pl. 24. cites 14 E. 3.

Rex prosequi in judicio potest, in qua curia ei visum fuerit; and may join in this case with the tenant's widow. Jenk. 14. pl. 24.—

This woman was the King's widow, and therefore the scire facias is well brought in both their names. Jenk. 14. pl. 24.

2. The King and his chaplain joined in action for trespass and contempt done in the King's palace, and in presence of him and his Justices. Br. Prerogative, pl. 48. cites 27 Aff. 49.

Br. Joinder in Action. pl. 56. cites S. C.

3. Where the King and another person join in action, the writ shall abate as to the common person, and stand for the King. Br. Prerogative, pl. 100. cites 35 E. 3. and Fitzh. Brief 729.

4. A. is bound by a written obligation in 100l. to the King and his customers. If the 100l. be not paid, the King and the customers ought to bring their action upon the said obligation jointly in the name of the King and the customers. By all the Justices in the Exchequer. Secta quæ scripto nititur, a scripto variare non debet. Jenk. 65. pl. 22. cites 21 R. 2. Fitzh. Joinder in Action 3.

5. A man may be tenant in common with the King, and may join in presentment with the King. Br. Prerogative, pl. 105. cites F. N. B. fol. 32.

So the King and a subject might join in suing a quare im-

pedit; so they may in founding a college or alms-house, but the King only shall be reputed the founder. Jenk. 65. pl. 22.

S. P. Be-  
cause the  
outlaw'd

[ 536 ]

person with-  
out the other

obligee,  
might have released the obligation.

opinion of the Court.

6. If a man is bound to two by obligation, and the one is outlawed, and the King gets the obligation, the King shall have action in his own name for the whole sum, and the other shall have nothing with him, and so a chose en action may accrue to the King. Br. Prerogative, pl. 23. cites 19 H. 6. 47.

Jenk. 65. pl. 22.—S. P. Per Parker Ch. J. in delivering the opinion of the Court. 10 Mod. 245. cites 21 H. 7. 19.

(Q. 4) *What Actions the King may have, or may be brought against the King, or what the party may do in lieu of Action.*

Wilby said that a man might have had writ of *precipe Henrico Regi Anglie*, and in lieu of this

is now given petition by the prerogative; quære of such writ. For it seems that it never was law; for the King cannot write to nor command himself. Br. Petition, pl. 12. cites 24 E. 3. 55.—Br. Prerogative, pl. 31. cites S. C. Brook says, Quære who should send such process; quære if the grand constable of England, when they were used, might do it or not.

Vide the Year-book, pl. 8. which is, that the defendant put himself upon the inquest in-

stead of the grand assise; but it seems there that Wilby refused to grant it, unless the King's attorney obtained a warrant for the same.—\* S. P. And so note that the King may use other writ as well as quære impedit and writ of right of advowson; and so see that the King may be out of possession there as a common person; but Brook says it seems to him that if office be found, which finds the King's title, that there the King is in possession by office without action; but where the King is heir to one who is deforced of land, there he may have writ of right; and it seems that this action ought to be tried by grand assise only; for quære if the King shall be compelled to join battle and find champion? It seems that he shall not; for no subject ought to join battle with the King. Quære. Br. Droit de Reſco, pl. 13. cites 24 E. 3. 37.

Br. Prerogative, pl. 55. cites S. C.

3. The King cannot have action which proves him out of possession as *assise*, or *ejectione firmæ*, nor action upon the statute of 8 H. 6. of forcible entry, quod expulit & amovit; and this is of things local and permanent; contra of things transitory, as quære impedit, ravishment of ward &c. And in the other case there shall be office or information. Br. Prerogative, pl. 89, cites 4 H. 7. 1.

4. Where a statute gives a thing which was not at common law before, as the statute of 4 H. 7. cap. 17. gives ward of heir to cesty que use by writ of ward, there the King and every other shall have action, viz. the subject shall have writ of ward, and the King shall have *ſcire facias*, tho' it be found by office; for where

Where it is given by statute, every one ought to pursue the statute, and there the King cannot enter by office, but shall have *scire facias*; quod nota. Br. Parliament, pl. 46. cites 12 H. 7. 19. per Frowike.

5. If a man gets *arbitrement mesne between the verdict and judgment*, he cannot plead it for default of day in Court, but shall have *audita querela*, unless in the Case of the King, and there he may plead it; for this action does not lie against the King. Br. Prerogative, pl. 96. cites 21 H. 7. 33.

6. Where *writ to the bishop* has been awarded against the King in quare impedit, yet the King may have another quare impedit, and make new title. Br. Prerogative, pl. 106. cites F. N. B. 35.

7. The King may have *writ of escheat*, which is *præcipe quod reddat*. Br. Prerogative, pl. 119. cites the Register, fol. 165. [ 537 ] And yet by some, in the time of H. 8. the King shall not have *præcipe quod reddat*, but his title shall be found by office. Br. Prerogative, pl. 119.

8. The King shall have *trespass de bonis asportatis*, but not de *clauso fracto*, nor other action of trespass done in land; for this shall come by *information*. Br. Prerogative, pl. 130. cites F. N. B. fol. 90.

9. An action does not lie against the King. Jenk. 78. pl. 53. S. P. Nor Voucher.— Br. Prerogative, pl. 146. cites 9 H. 6. 56.

## (Q. 5) Variance. In what Cases the King may vary his Count &c.

1. **I**N quare impedit by the King the defendant made title, and traversed the title of the King; and it was said that the King might take issue upon which point he pleased. Br. Prerogative, pl. 78. cites 4 E. 3. 11.

as he ought absque hoc &c. and so traverses the title of the King contained in the office, the King may choose to maintain his title, or to traverse the title alleged by the plaintiff who travers'd; for the King is not bound to stand to the first traverse which tenders an issue, but may traverse the matter of the plea of his adversary; contra of a common person; for he ought to maintain that which is contained in the absque hoc; note the diversity. Br. Prerogative, pl. 65. 13 E. 4. 8.—S. P. Ibid. pl. 69. cites S. C. For none shall have the lands out of the hands of the King without making title.—S. C. cited Vaugh. 62. Trin. 21 Car. 2. C. B. in Case of the King v. the Bishop of Worcester.—S. P. Per Egerton Solicitor. 2 Le. 123. Mich. 29 & 30 Eliz. B. R. in Case of Venables v. Harris.—2 L. P. R. 141. cites S. C.—And it was said, Hill. 7 E. 6. That so it is \* usual in information sent by the subject for the King into the Exchequer, that where the defendant pleads bar, and traverses the information, the King may traverse the matter of the bar, if he will, and is not bound to maintain the matter which is contained in the absque hoc. Ibid.—\* Orig. (Videretur).—S. C. cited Vaugh. 63. in Case of the King v. the Bishop of Worcester.—Br. Traverse per &c. pl. 369. cites 38 H. 8. contra.—Where the King's title appears to be no more than a bare suggestion, the King cannot forsake his own title, and endeavour only to destroy the defendant's title; for the weakening the defendant's title cannot make a good title to the King. Vaugh. 61 Trin. 21 Car. 2. C. B. in Case of the King v. the Bishop of Worcester.

2. *Quare impedit* by the King, he declared, and after, in another term, the defendant travers'd the presentments. Danby prayed that the King might vary and declare de novo; for where the King demurs in law, he may \* waive the demurrer and traverse the King may waive his

*demurrer in law, and join issue.* Br. Prerogative, pl. 64. cites 5 E. 4. 118. —S. P. 5 Rep. 104. Trin. 42.

*the plea*; but per Prisot, when the King declares and takes day, there he cannot waive it, and declare de novo; but demurrer in law is as you say. And also *in the same Term* he may vary, *but not in another Term* upon declaration had before; and so was the opinion of the Court. But in B. R. it is otherwise. But it was said that M. 19 E. 3. it is adjudged that he may. Br. Prerogative, pl. 3. cites 28 H. 6. 2. near the end.

Eliz. B. R. in Baker's Case.—S. P. Or he may *waive the issue and demur*. Ibid. pl. 69. cites 13 E. 4. 8.—S. P. Vaugh. 65. in Case of the King v. the Bishop of Worcester.—S. P. 10 Mod. 200. cites Vaugh. 65 Dy. 53. and 1 Vent. 17.—*But if the demurrer be adjudged against the King, it is peremptory*; and the party shall have ouster le main; quod nota. Br. Prerogative, pl. 111. cites 29 H. 6. and Fitzh. Traverser 4.—*Or if the King joins issue, which is joined against him, he cannot tender other issue after upon this matter*. Br. Prerogative, pl. 13. cites 9 H. 4. 6.—Br. Traverser de Office 9. cites S. C.

*In quare impedit by the King, he made title, which was insufficient*, by reason of the statute of 25 E. 3. pro clero, cap. 1. of voidances of churches in another's right; and the defendant took exception by it, and the Court held with him; and the King departed from this title, and made other title by another right and mean, and was suffered; quod nota. Br. Prerogative, pl. 14. cites 11 H. 4. 8.

† *In quare impedit the King made count, and in another term relinquish'd it, and counted another count*. Br. Prerogative, pl. 15. cites 11 H. 4. 37.—Ibid. pl. 69. cites 3 E. 4. 5. Contra, that a man traversed office, by which the King and he were at issue, and venire facias awarded returnable in B. R. and the King's attorney came and would have changed the issue, and could not in another Term, but might in the same Term.—S. P. For the matter is not chan'd. Jeak. [ 538 ] 133. pl. 17.—S. P. For then he might do it indefinitely. Vaugh. 62. 6. in Case of the King v. the Bishop of Worcester.—*And in quare impedit pro Reg.*, if he declares, he cannot vary from the declaration in another Term, and make a new one, but the same Term he may. Ibid.—S. P. otherwise the King might change without limit, and tie the defendant to a perpetual attendance; for in these cases, as to the right, all things remain, and are as they were at first. Vaugh. 65. in Case of the King v. the Bishop of Worcester, cites 13 E. 4. and 28 H. 6. 2. a.

*So in a decies tantum where the defendant pleads ill bar, and the plaintiff replies to it, and will not demur*, the King cannot demur; quod the Reporter conceits; for the King is not intitled till judgment; but he denied the other case, for there the King is intitled by the judgment upon the outlawry. Ibid.

3. The King cannot demur upon plea pleaded in avoidance of outlawry, where the plaintiff replies and joins issue; for the King is not intitled but by reason of the party. Br. Prerogative, pl. 43. cites 38 H. 6. 1.

But if it be found for the King, the recognizance is determined, and the King shall have the sum. Br. Recognizance, pl. 21. cites S. C.

4. Scire facias pro Rege upon recognizance of the peace for breaking the peace; after the jury challenged, the King relinquished the issue; but there the King may have a new scire facias after; but this issue is determined, and the recognizance remains in force; quod nota benc. Br. Prerogative, pl. 140. cites 10 H. 7. 11.

S. C. cited Vaugh. 63. Trin. 21. Car. 2. C. B. in Case of THE KING v. THE BISHOP OF

5. Where information is put in the Exchequer upon penal statute, and the defendant makes bar and traverses the plea; there the King cannot waive such issue tendered and traverse the former matter of the plea, as he may upon traverse of office &c. where the King is sole party, and intitled by matter of record; for upon the information there is no office found before, and also a subject is party with the King to recover the moiety or the

the like; quod nota bene. Br. Prerogative, pl. 116. cites 34 WORCES-  
H. 8. Per Whorwood, the King's Attorney, & al'. TER, as 38  
H. 8. And

says that  
this case seems to conclude, that when the information is only for the King, and a material point  
travers'd, upon which issue is joined, that the King is not bound to that issue, but may take another.  
—And Ibid. 64. S. C. cited verbatim; and then adds, Here it is most apparent that upon an in-  
formation, when the King hath no title by matter of record, as he hath upon office found, the King  
cannot waive the issue tender'd upon the first traverse, tho' the information be in his own name;  
and for the supernumerary reason, that the King is not the sole party in the information, is but  
frivolous and without weight, but the stress is where the King is sole party, and intited by  
matter of record.

6. In a *quo warranto* for usurping certain liberties, the defend-  
ant pleaded a special plea; the King replied, the defendant was  
ready to rejoin, and after in another Term the King changed his  
replication, and therein tender'd a new issue. It was moved, that  
the defendant might change his plea, inasmuch as the King had  
alter'd his replication in divers matters of substance, and the  
pleading is yet in paper. But per Cur. this is not *ex gratia*  
curiæ, that the King shall alter his replication, but jure prero-  
gativæ; and tho' the pleading be in paper, yet it is in another  
Term, and therefore without the assent of the King's attorney  
it cannot be amended; nor would the Court allow him to plead  
the general issue, viz. non usurpavit, without assent of the  
King's counsel. 2 Roll. R. 41. Trin. 16 Jac. B. R. The King  
v. Glemmon.

7. An action was brought for imbezziling the King's goods,  
and the declaration laid it to be done in London. The Court held,  
that the King might choose his county, and waive that which  
he seemed to have elected before, as he may waive his de-  
murrer and join issue, and e contra. Vent. 17. Pasch. 21 Car. 2.  
B. R. The King v. Webb.

8. If the King brings a quare impedit, and counts that he was  
seised of the advowson in gross and presented. When the true patron  
shall confess his presentation, and avoid it by shewing that his  
presentation was in right of the ward by lapse, by reason of out-  
lawry, or of temporalities being in his hands; the King shall desert  
his own title, and controvert the defendant's title in whose  
right he did formerly present, and if his title happen to appear [ 539 ]  
not good, shall recover the second presentation. Vaugh. 61.  
Trin. 21 Car. 2. C. B. in Case of the King v. the Bishop of  
Worcester.

9. The Crown may change their own venue. The Queen  
may amend her pleadings at any time, nor will any estoppel  
bind the Crown. 10 Mod. 200. cites Hob. 339. Sid. 412.

## (Q. 6) Pleadings and Proceedings.

See (M. 2)  
pl. 6. f. 7.  
13. 25. 34.  
and pl. 8. f.  
3. (Q. 5.)

1. WHERE the King is party, the process shall be always  
non omitas; for no franchise can hold against the  
King; quære if licet fuerimus pars be in the patent. Br. Prero-  
gative, pl. 109. cites 41 Aff. 17.

U u 2

2. In

2. In quare impedit the King may alledge presentation in his ancestor and another in himself; and it is not double; contra between common persons; and plenarty is no plea against the King, for laches shall not be adjudged in him; quod nota bene by reason of his prerogative. Br. Prerogative, pl. 76. cites 43 E. 3. 14.

And if double return shall be made for

the King of the statute against a merchant who does not import bullion according to the form of the statute, a man shall have advantage of the doubleness. Br. Double, pl. 98. cites 4 E. 4. 3.

4. Where writ of error is sued against the King, no scire facias shall issue; for the King is always present in Court. And therefore the entry is, *Quod W. H. attornatus generalis domini regis qui pro ipso rege sequitur*, and not *Quod dominus rex per attornatum suum sequitur* &c. Br. Prerogative, pl. 128. cites F. N. B. fol. 21.

B. P. Jenk.  
33. pl. 61.

5. If evidence be given for the Queen in information or any other suit, and the defendant offers to demur upon it, the counsel of the Queen shall not be compelled to join in demurrer, but in such case the Court may direct the jury to find the special matter, and upon this they shall adjudge the law, as appears 34 H. 8. D. 53. But this is by the prerogative of the King. 5 Rep. 104. Trin. 42 Eliz. B. R. in Baker's Case.

\* Monstrans de droit is as much as to say, the shewing of right: in a legal sense it denotes a suit in Chancery, for the subject to be restored to lands and tenements, which he shews to be his right, though by office found to be in the possession of another lately dead; by which office the King is intitled to a chattel, freehold or inheritance in the said lands. Cowel Interp. verbo Monstrans de Droit.—2 L. F. R. 201.—\* See (Q. 8) infra.

(Q. 7.) \* *Monstrans de Droit & Petition &c. for restoring Lands &c. Antiquity thereof, and how considered. And in what Cases it may be, and How.*

1. IF a man holds of the King in capite, and other lands of other lords, and dies, his heir within age, the other lords shall have petition of their rents in the nonage of the heir. Br. Petition, pl. 43. cites 24 E. 3. 4. per Hillarie J.—But see now the statute of \* 2 & 3 E. 6. 8. Ibid.

Br. Petition,  
pl. 18. cites  
S. C. and  
that in such  
case age  
does not lie  
for the heir  
in ward of

2. A man sued by petition to the King to have his presentation repealed, and that the plaintiff be restored to his advowson, and upon the matter had the presentation of the King repealed by the petition, which was in nature of quare impedit. Br. Presentation, pl. 40. cites 43 Aff. 21.

[ 540 ] the King, in whose right the King presented; and that before any plea pleaded *scire facias* issued against the presenter of the King ad informandum dominum regem before any plea pleaded; and because the presenter of the King would not maintain that the heir had any thing

thing by descent (the plaintiff in the petition having set forth a gift of the land, and of the advowson appendant to him with warranty in fee) the presentation was repealed. Quod nota.

3. If joint-feeoffee confesses that the feoffment was made to him and others by collusion by the King's tenant to defraud the King of the ward, the King may seize all the land, and the other feeoffee shall be put to petition, as it seems. Br. Petition, pl. 33. cites 10 H. 4. and Fitzh. Traverse, 50.

4. At common law there was no traverse, but petition; and this was in lieu of writ of right for the party, and to avoid delays the statute was made, that a man may traverse the office, which statute does not toll the search which was at common law, but the petition; per Sotek And per Spilman, the statute which gives traverse is only of ward, and of fine for alienation &c. which are only chattels, and of those was no traverse at common law; but of franktenement, traverse was at common law. Br. Traverse de Office, pl. 18. cites 9 E. 4. 51.

per Littleton, but Choke contra. Br. Traverse de Office, pl. 40. cites 21 E. 4. 3.—Traverse was not at the common law of a thing real, before the statute of 34 & 36 E. 3. but petition and monstrans de droit. But of a chattle traverse was at common law. Br. Traverse de Office, pl. 38. cites 13 E. 4. 8.—Br. Petition, pl. 30. cites S. C.—S. C. cited 2 Inst. 689.—Petition was not at the common law of \* chattels; for petition did not lie but of franktenement at the least; per Catesby; quod Hussey concessit. Br. Petition, pl. 19. cites 1 H. 7. 3.—Of chattle real a man shall have petition of right, as well as of franktenement; per Brian. Br. Petition, pl. 14. cites 7 H. 7. 11.—S. P. because chattels personal are bona petitura, and cannot abide the delay of a petition. 2 Inst. 689.

5. In case where a man may traverse an office, he may sue by petition; per Spilman; quod non negatur. Br. Traverse de Office, pl. 18. cites 9 E. 4. 51.

nature is to have search. Br. Petition, pl. 15. cites S. C.

6. Petition of right is in nature of his real action, which he cannot have against the King, because the King by his writ cannot command himself. 4 Rep. 55. a. Trin. 30 Eliz. in Case of Warden &c. of Sadler's Cafe.

7. A petition of right is grounded upon a matter of fact suggested, upon which a commission issues to inquire of the truth of this suggestion, except the attorney confesses the truth of the matter suggested, as in a petition of dower. Skin. 608. Mich. 7 W. 3. B. R. in the Banker's Cafe.——cites 3 Inst. 215.——Moor 639.——Co. Ent. 462.——9 Hen. 4. 4.

8. In all cases of a petition to the King, this is to controvert the title of the King; the case might have been so that a petition might have been necessary, as if the King's creditor had been attainted before an assignment inrolled, and after a grant was made, and a seizure had been made into the King's hands, the party ought to go by way of petition; for in no case is the party put to his petition, but when he controverts the title of the King. Skin. 608. Mich. 7 W. 3. B. R. in the Banker's Cafe.

(Q. 8) Monstrans de Droit or Petition. *Statutes relating thereto.*

This act is more extensive than the statute of 34 E. 3. cap. 14. which extended only

1. 36 E. 3. cap. 13. f. 1. *FOR* grievous complaint, that the King has heard by his people of his escheators, and of their evil behaviour, he wills and has ordained, that \* lands seized into his hands because of ward, shall be safely kept without waste or destruction.

to cases where the King was intitled by office, and to the cases of alienation, without licence, and the cases of ward. But three things were grievous, which were not remedy'd by that act. 1. No office was within the purview, but only office found *virtute brevis* or *commissionis*, the words being (taken by commandment of the King) so that office found *virtute officii* was out of that act. 2. The said act extended only to two cases, viz. *alienation without leave*, and of *ward*. 3. It extended to *traversers only*, and not to *monstrans de droit*; so that tho' issue was found for the plaintiff, yet the Judges could not proceed to judgment without a writ of *procedendo ad iudicium*, and to remedy these mischiefs was this statute of 36 E. 3. cap. 13. made. 4 Rep. 56. b. 57. a. Case of the Wardens &c. of Sadlers.

\* Resolved, that this act extends generally to lands seized &c. by office, it being a beneficial law made in advancement, and for execution of justice and right without delay, and therefore shall be taken generally, according to the letter and intention of the act. 4 Rep. 58. a. And the Reporter in a note there says, that a termor may have travers by this statute.

S. 2. And that the escheator have no fee of wood, fish, nor of venison, nor other thing, but shall answer to the King of the issues and profits yearly coming of the said lands, without doing waste or destruction.

S. 3. And if he do otherwise, and thereof be attainted, he shall be ransomed at the King's will, and yield to the heir the treble damages at his own suit, as well within age, as of full age.

S. 4. And his friends, as long as he is within age, shall have the suit for him, answering to the said heir of that which shall be so recovered.

\* These words are general,

1. As to the matter; for

they are not restrained to the two things, viz. of alienation and ward mentioned in the 34 E. 3. cap. 14. and 2dly, as to the office, but extend as well to offices found *virtute brevis* or *commissionis*, as to offices found *virtute officii*. 4 Rep. 57. a. Case of Wardens &c. of Sadlers.

\* It was insisted that those words, (viz. That the escheator send the inquest into Chancery within the month &c.) ought to be intended of

office found *virtute brevis* or *commissionis*; because no office found before the escheator *virtute officii* may by the law be returned into Chancery, but only into the Exchequer, according to 4 E. 4. cap. 24. a. and 28. m. f. P. erogat. 70. b. But it was answer'd and resolved upon shewing infinite precedents

S. 6. And if there be any man that will make claim or challenge to the lands so seized, that the \* escheator send the inquest into the Chancery within a month after the lands so seized, and that a writ be delivered to him to certify the cause of his seizure into the Chancery, and there he shall be heard without delay to traverse the office, or otherwise to shew his right, and from thence sent before the King to make a final discussion without attending other commandments.

In all ages, that such offices have been returned by the escheator, as well into Chancery as the Exchequer, and he has *election to return it into which of the two Courts he will*; for he is attendant to both, and they are both the Courts of the King.—And as to the following words, (viz. † He shall be heard without delay to traverse the office) those words are general as to the matter and manner of the office; so by those two branches the two first of the said defects were remedy'd; (or otherwise shew his right &c.) by which words, the monstrans de droit was given to make a final discussion, without attending other commandment, and by those words shall proceed to judgment without any procedendo, and so all the said mischiefs are remedy'd. But it was resolved, that this act *extends not to any judicial record or recovery, but only when nothing appears of record for the King to p'side the office*; and therein was great reason; for in case of † attainder and office, the King is *intitled by double matter of record*, and therefore the party grieved ought to avoid it by double matter of record, and not by single travers or monstrans de droit, and therefore shall be put to his *petition*, upon which he shall have office found, comprehending his title of record; and upon this the party grieved shall traverse the title of the King found by the office, or shew his writ and confels and avoid it, and if upon the travers or monstrans de droit it be found for him, or the same be confels'd by the Attorney-General, he shall then have an *amoveas manum*; for he has answered [ 542 ] and satisfied double matter of record by double matter of record. 4 Rep. 57. a. b.—But see Statute 2 E. 6. 8.

† S. P. Br. Petition, pl. 28. cites 4 E. 4. 21.—S. P. Br. Traverse de Office, pl. 28. cites 4 H. 7. 7. and says, this was agreed very often in the time of H. 8.—Br. Petition, pl. 28. cites S. C.—See (Q. 11) pl. 11.

2. 2 & 3 E. 6. cap. 8. *Where many and divers persons holding, or that have holden, lands, tenements, or hereditaments, some for term of years, and some by copy of Court-roll, have been expelled, and put out of their terms and holds, by reason of inquisitions, or offices found before escheators, commissioners, and others, containing tenures of the King in capite, intitling the King to the wardship or custody of such lands or tenements; and sometimes intitling the King to the same, upon attainders of treason, felony, or otherwise, by reason that such \* leases &c. for years, or interest by copy of Court-roll of such persons, have not been found in such inquisitions or offices; after which expulsion or putting out, the said persons have been without remedy, for the obtaining of the said terms and holds, during the King's possession therein, and can have no traverse, monstrans de droit, nor other remedy for the same, because their said interest is but a chattel in the law, or customary hold, and no estate of freehold; and also, where any person or persons has any rent, common, office, fee, or other profit apprender of any estate of freehold, or for years, or otherwise, out of such lands or tenements, specified in such offices or inquisitions, the said rent, common, office, fee, or profit apprender, not being found in the same office or offices, such persons are in like manner without remedy to obtain, or have the said rent, common, office, fee, or profit apprender by any traverse, or other speedy mean, without great and excessive charges, during the King's interest therein, by force of such inquisition or office.*

It was resolved, Mich. 34 & 35 Eliz. in the Court of Wards, by the two Chief Justices, in Case of the Countess of Rutland, upon consideration had of the said acts of 34 E. 3. 36 E. 3. and 3 H. 6. that he in the remainder expectant upon an estate tail or freehold, or that hath a dry reversion, expectant upon any estate of freehold, without any

rent or profit but only fealty, shall not traverse a false office, finding the dying seised of such a remainder or reversion; for these statutes give a traverse, when the lands are seised by the King, and the party ousted thereof; and the seisin of tenant for life is the seisin of him in remainder or reversion. And the judgment cannot be given, *quod manus domini regis amoveantur*. See Stamf. Prerog. 13. He in the reversion may sue livery &c. Dyer 14 Eliz. 319. Stamf. Prerog. 62. a. b. 2 Inst. 688.

\* Upon these words it has been doubted, whether a tenant by statute merchant, staple, or elegit, or executors that have interest in lands by a devise for payment of debts, and the like, were within this law, because they are not lessees for years; but the common opinion is, that these interests are within the purview of this act: for that they are not only within the same mischief, being without remedy, but within the express reason of this law, viz. because their said interest is but a chattel real, and all the above-said interests are but chattels real. 2 Inst. 688.

This hath reference to the preamble, and extendeth not only to offices in case of wardship by tenure in capite, but to offices upon attainders of treason, felony or otherwise; wherein the generality of these words (or otherwise) is to be observed. 2 Inst. 683.

S. 3. *Where any office or inquisition is found, omitting any title, for term of years, by copy of Court-roll or other interest, every lessee or copyholder, and every person that shall have any interest to any rent, common, or profit appender, out of any lands contained in such office or inquisition, shall enjoy their leases and interests, rents &c. as they might have done, in case there had been none such office or inquisition found, and as they ought to have done in case such lease, interest by copy of Court-roll, rent, &c. had been found in such office or inquisition.*

S. 6. *If any person be untruly found lunatick, idiot, or dead, every person grieved by such office or inquisition shall have his traverse, as in other cases of traverse upon untrue inquisition or offices.*

[ 543 ]

S. 7. *Where it is untruly found, that any person attainted of treason, felony, or praemunire, is seised of any lands at any time of such treason, felony or offence committed or after, whereunto any other person has just title of freehold; every person grieved thereby shall have his traverse or monstrans de droit, without being driven to any petition of right, and like remedy and restitution upon his title found or judged for him, as has been used in other cases of traverse.*

This proviso extends only to traverses, and not to any monstrans de droit to be pursued by force of this act, either for the suing out of writs of scire facias, or that therein writs of

S. 13. *Provided in all such cases, as any person shall be enabled by this act to have any traverse, and shall pursue his traverse, he shall sue one or several writs of scire facias against all such as shall have interest by the King or his patentees, as is requisite upon traverses or petitions heretofore pursued. And in every such scire facias the patentees or defendants shall have like pleas, as they had in any scire facias before this time awarded against any patentees in any case of petition; and upon every traverse pursued by virtue of this act, in such case as the party that shall pursue should by the common law have been put to sue by petition to the King, there shall be two writs of search granted, as like writs have been granted upon petitions made to the King.*

search shall be granted, because the monstrans de droit does confess and avoid the title of the King, and the traverse denied it. 2 Inst. 611. cites 14 E. 4. 1, 7.

Nota, In many cases 2 matters of record with necessary averments shall amount to an office; but thereupon a scire facias is to be granted, wherein the party may traverse any of the material averments &c. 2 Inst. 194. cites 21 Ass. p. 36. 21 E. 3. Livery, 40 Ass. 46. 50 Ass. 2. 2 E. 3. 10. b.

\*The words (upon any traverse) extend not to a monstrans de droit to be pursued on

S. 14. *Provided also, that if after any judgment given upon any traverse by virtue of this act, it shall appear by any matter of record, that the King has any other former title, the same shall be saved to the King, the said traverse and judgment thereupon given notwithstanding.*

this statute. 2 Inst. 695.—This proviso was added (for that this act gave a traverse, where none was at the common law, and that it should be judged for them, for whom it was found &c.) least the judgment being warranted by authority of parliament should bind any former right the King had; and that appeareth also by the conclusion of this branch, viz. the said traverse and judgment thereupon given notwithstanding; but it seemeth to be abundans cautela, for the judgment upon a traverse

1<sup>st</sup>, *Quod maner domini regis amoveantur, & possessio restitatur* to him that traverseth, salvo jure &c. It is to be observed, that there be certain records, which intitle the King, that by law are not traversable; in which cases, tho' the King be intituled but by single matter of record, yet the party grieved is put to his petition, and cannot be holpen by traverse or monstrans de droit. As taking one example for many, King H. 4. recovered in the King's Bench, in a quare impedit against the prior of T. the presentation to a church, and had a writ to the bishop, and his clerk received &c. where in truth the prior never knew of the suit, nor was summoned, attached, or distrained by the sheriff; and thereupon the prior moved the Court of King's Bench to grant a writ, to cause to come before them the summoners, the pledges and mainperners upon the distress to be examined in this matter. And in this case five points were resolved by Gascoigne Ch. J. and the Court, viz. 1<sup>st</sup>, That the prior was driven to his petition in nature of a writ of disceit, albeit in this case the King recovered in auter droit. 2<sup>d</sup>, That if a common person had recovered, the defendant had been driven to his original writ out of the Chancery, and could not proceed upon any judicial process out of this Court. 3<sup>d</sup>, That if the conclusion of the petition be, that the King should command the Court of King's Bench to proceed to the examination &c. then, without any writ out of the Chancery, the Court may proceed to the examination. 4<sup>th</sup>, But if the petition doth conclude generally, that the King should do right, then the prior should be driven to his original out of the Chancery. 5<sup>th</sup>, That before such writ be granted, the prior, upon a commission out of the Chancery, ought to have his right found by inquest. But this statute extendeth to offices found by writ, commission, or ex officio, and not to other records. 2 Inst. 695.

Ld. Coke says, His advice to such as shall traverse by force of this act is, that in the inducement to the traverse, they allege their own title (which they ought to do; for no man shall have the lands out of the King's hands, without making a title) justly and truly; for the Attorney-General for the King may either take issue upon the traverse, or by the King's prerogative upon the title of the party that traverseth, at his choice. 2 Inst. 695.

It is a maxim in law, that whensoever any man is by any office traversable moved from his possession, he must traverse the office in the Court where the office is returned. Of house and lands which do lie in livery, and whereof there is manual occupation and profit presently taken, the party, by finding of the office, is out of possession; but of rents, villeins, commons, advowsons and other inheritances incorporeal which lie in grant, the owner is not out of possession (be they appendant or in gross) by the finding of an office; and therefore, in any information or action brought by the King for the same, the party may traverse the office in that Court where the information or action is brought for the King. And in all cases, when the King is not in possession by the office, and he obtains not possession within the year after the office found, then cannot the King seise without a seire facias. 2 Inst. 695, 696.

(Q. 9) Petition, or Monstrans de Droit, for restoring Lands &c. out of the King's Hands. [ 544 ]  
Necessary; In what Cases. See (Q. 11).

1. **WHERE** a man holds of the King in capite, and of others in chivalry, and dies, and the King seises the heir within age and all the lands, the lords may sue to the King by petition for their rents, and shall have it, and shall have writ thereof, and yet by some their seigniories are suspended for a time &c. Bt. Rents, pl. 9. cites 24 E. 3. 24.

2. When the presentee of the King is instituted and inducted, and the presentee of another is ousted, he who is ousted has no other remedy, but by petition; for the statute of 13 E. 3. does not benefit him. 2 H. 4. 17. a. b. pl. 25.

Br. Petition, pl. 3. cites S. C. and Brook says, that the words

are, that he shall plead against the King, but where no action is brought he cannot plead, and therefore upon institution and induction he shall have petition.

3. Where the King has ward by descent, as he may (for chattel shall descend in case of the King), and grants the land for life, the remainder over in fee, yet the heir sued sci. fa. to repeal the patents, and they were repealed, and the land re-  
Where the King is possessed of land in ward and dies, it shall descend to  
seised

the new King, and not to the executor, and by this he shall not be seised in fee, and in this case the King was not seised in fee but in ward; and therefore, when the King makes a gift in fee of such land, because he is deceived in his grant, he shall re-seise and make livery, and the heir shall not be put to sue by petition, Br. Livery, pl. 16. cites 7 H. 4. 41.

*Contra, where the King enters without office or title, and makes seoffment or lease, there the other may enter.* Ibid.

4. In every case, where the King is seised by judgment of record, as by forfeiture &c. though the King makes seoffment, or leases for term of life where another has title or cause of action, there he shall sue by petition, Br. Petition, pl. 9. cites 9 H. 4. 4. per Gas. coigne.

It was said for law, that if land comes to the King by office, out of which I have a rent-charge, or rent-seck, which is not found in the office, I am put to petition. Br. Office devant &c. pl. 38. cites 4 E. 4. 22. 23. — S. P. Br. Petition, pl. 28. cites 4 E. 4. 21. — So of common, statute-merchant &c. Br. Petition, pl. 28. cites 4 E. 4. 21. — So where the King after this gives the same land by patent to another, yet the party is put to his petition for the rent, and cannot distrain; but if the charge had been found by office, then the party might distrain the patentee, but cannot distrain the King; and this where the King is intitled by record. But if he enters without title or otherwise without record, (as) if a man infeoffs him by deed inroll'd of my land, I cannot distrain nor enter upon the King; but if in this case he gives it over by patent, I may distrain or enter upon the patentee. Br. Petition, pl. 28. cites 4 E. 4. 21.

Br. Nonsuit, pl. 12. cites 11 H. 4. 52.

6. Petition of right, and traverse upon it, and non-suit in the petition; and the opinion was, that he may have new petition notwithstanding the nonsuit; and suit by petition shall not be made to the Queen, but he shall have *assise*. Br. Petition, pl. 10. cites 11 H. 4. 52. 67.

[ 545 ] 7. He who recovers in value against the King by reason of warranty or clause of recompence, shall have his reason entered upon his aid prayer of the King, and then shall have his recovery by petition, and otherwise not; quod nota; that he shall make petition thereof. Br. Petition, pl. 1. cites 9 H. 6. 3.

But where termor is outlaw'd, and the term expires, the lessor may enter upon the King; for he has not franktenement but chattel; per Newton, quod non negatur. Ibid. — Br. Livery, pl. 5. cites S. C.

8. Where the King may seise, and seises land, as for alienation without licence, or the like, there the party, when he has made fine, or when the interest of the King is determined, cannot enter, but is compelled to sue livery. Br. Office devant &c. pl. 2. cites 9 H. 6. 20.

9. It was said for law, that where the *eschator seises* for the King *virtute brevis* where the King has no title, yet the party who has term for years, and is ousted by it, is put to his petition; and so note there, that it is admitted, that petition *lies of a term*. Br. Petition, pl. 2. cites 9 H. 6. 21.

But where the *eschator seises* *without title* as above, *virtute officii*, he is not put to

any petition, but may disturb the *eschator*, or have writ of *trespass*. Ibid.

10. In the case of charter of *pardon* of the King *pleaded in bar of execution* it was agreed by all the Justices, that a man shall have petition to *re-have his goods and chattels*. Br. Petition, pl. 3. cites 34 H. 6. 51.

As if *eschator* *virtute officii* seises goods, and accounts for them in the

*Exchequer*. Ibid.—Or if a man be outlaw'd, and the *eschator* accounts for his goods in the *Exchequer*, and after the party *reverses* the outlawry by writ of *error* or the like, he shall have petition in those cases &c. and the King shall indorse the petition in such form, *Let right be done to the parties* & quod nota. Br. Petition, pl. 3. cites 34 H. 6. 51.

11. It was found by a certain inquisition, that the Lord Hungerford was attainted by parliament anno 1 E. 4. and that L. and J. were seised of the manor of S. of the *feoffment* of A. to the use of the Lord Hungerford, the 4th day of March anno 1 E. 4. and that by the statute 1 E. 4. the said Lord H. was attainted of high treason, and that all castles, manors, lands, tenements, and other hereditaments, whereof he was seised, or others to his use in fee or fee tail the 4th day of March anno 1 E. 4. shall be forfeited &c. upon which commission issued to enquire &c. and found as above, and the office was returned in Chancery, and the King gave the said manor of S. to D. T. and within a month after the putting in of the office, the *feoffees* aforesaid came into Chancery and put in their traverse against the King; and in the act of attainder it was ordained, that if any of those attainted were sole seised, or jointly seised and to another's use, that this land should not be forfeited or seised into the hands of the King; and said that they were seised to the use of the Lady H. mother of the lord who was attainted, absque hoc, that they were seised to the use of the Lord H. who was attainted, and prayed livery cum exitibus, and upon this the Lady H. put in surety for the *feoffees*, and took the land to farm according to the statute &c. And the question was, if the party shall have his traverse as here, or shall be put to his petition? And there it was said, that where the King is intitled by double matter of record, as by \* *attainder and inquisition*, the party grieved shall not have traverse, but petition to the King; but where the King is intitled by *inquisition or office only*, there the party grieved may traverse, and shall not be put to his petition. Br. Petition, pl. 28. cites 4 E. 4. 21. Lord Hungerford's Case.

S. C. cited 4 Rep. 58. in Case of the Wardens and Commonalty of *Salford* leas.

\* Where it is found by office that J. S. who was attainted of treason, was seised of

certain land, yet the party may come into the *Exchequer* or Chancery where the office is, and say that there is no such attainder, and if this be so found he shall have his land without petition; quod nota, per all the Justices. Br. Petition, pl. 23. cites 4 H. 7. 7.

12. Where the King has a *valeat* admitted to a *corody* without other matter, this is such possession as cannot be discharged without petition. Br. Petition, pl. 26. cites 5 E. 4. 118.

13. It

Hard. 13. cites this case, and reports the judgment to be that the mortgagee should receive the profits presently, and should be put to his monsttrans de droit to get his lands out of the King's hands.—The King shall lose the whole by the re-entry of the mortgagor. D. 369. pl. 51.—S. C. cited Hard. 13. Arg.

S. C. and P. Skin. 619. Mich. 7 W. 3. B. R. by name of Breton v. Cole.

13. It was found by office that a mortgagee of lands held in socage died seised of them, and of lands held in capite, his heir being within age; afterwards the mortgagor paid the money to the executors of the mortgagee and entered. D. 236. pl. 25. Mich. 6 & 7 Eliz. makes a quære, if he should answer the profits to the King till livery sued out by the heir or not? But says it was held, Pasch. 10 Eliz. in the Case of BOWER v. BARNES, that the mortgagor after the payment shall have the land out of the King's hands by a monsttrans de droit upon this matter of record and suggestion of payment without being driven to his petition.

14. In trespass by B. against a sheriff's bailiff for taking 43 sheep, and two lambs. They justified the taking them levant and couchant on the land, whereof J. S. was seised in fee, and which was extended on an outlawry of the said J. S. by virtue of a levavi facias to the sheriff, and of his precept to them. Whereupon there was a demurrer. Holt Ch. J. in delivering the opinion of the Court, held, that if the plaintiff had a right to the land precedent to the outlawry, as for instance a lease for years from J. S. yet if this be not found by inquisition, or afterwards allowed in the Exchequer, he cannot have action of trespass. For if it be not found, he must go into the Exchequer by way of monsttrans de droit, and plead it there. 12 Mod. 175. 174. Hill. 9 W. 3. Britton v. Cole.

### (Q. 10) *Who shall have Petition in Respect of Estate.*

1. **E**Xception was taken inasmuch as T. F. sued by petition, and had nothing but in right of A. his wife, et non allocatur; for the execution upon the statute is only a chattel, which he may alien at his will, and they may join, or he alone may have the suit; quod nota. Br. Petition, pl. 17. cites 37 Aff. 11.

\* S. P. Br. Petition, pl. 2. cites 9 H. 6. 21.

2. *Tenant by statute merchant*, who has only a chattel real, may have petition if he be ousted, and shall have restitution; and therefore Brooke says, it seems to him that the same law is of a termor. Br. Petition, pl. 17. cites 37 Aff. 11.

### (Q. 11) *Recovery against the King; how it shall be; by Monsttrans de Droit, Petition, Traverse, or Scire Facias.*

Br. Re-fei-ser, pl. 13. cites S. C.

1. **P**ETITION shall be made to the King during the time that the King has the franktenement in him, and not after he has dismissed himself of the franktenement, per Shard; Brook says, quære

quare inde, where office is found, which intitles the King. Br. Petition, pl. 13. cites 24 E. 3. 65.

2. If the King seises the ward of J. S. which does not belong to him, but to W. N. yet the heir cannot enter at full age, but shall sue to the King; per Thorp J. and Cur. Brooke makes a quære, if this suit shall be by petition or monstrans de droit. Br. Petition, pl. 40. cites 26 Aff. 57.

3. It was found by diem clausit extremum, that J. N. tenant of the King died seised without heir of land in London, by which the King granted it to T. N. for his life, and a writ to the Mayor to put him in seisin, who returned, that the said J. N. devised it by testament inrolled within the year to E. his feme for term of life, who is yet alive, and the reversion to be sold by her; the grantee of the King entered, and E. sued scire facias to re-have the land; and because this devise is not found in the office, nor any office is found for the said E. the devisee, therefore the scire facias does not lie. But by some E. may have assise. Quære. It seems, E. shall have petition or monstrans de droit; for E. cannot traverse; for the office is true, and the devise stands with the office, and both are true. Br. Office devant, &c. pl. 19. cites 29 Aff. 31.

by petition for an office, which might serve her. Out of which the Reporter observes, 1st, That at common law, when the King by office was seised of estate of franktenement, tho' all the points of the office were true, yet the party grieved was put to his petition in nature of his action real, unless his title be found by office. 2d, That petition lies to the King, tho' he had departed with the franktenement. 3d, That inasmuch as the title of the King is found by inquest of office by oath, the title of a subject ought to appear by record of as high a nature, viz. by like inquest of office upon oath, and not by return of the mayor, which tho' it be of record, yet is not of so great regard in law as office found by oath.

4. J. A. sued by petition in parliament, supposing that where the King seised certain lands as escheat for felony done by W. which the King had given to S. U. in fee, which descended from S. to R. as heir of S. and that W. who was the felon, had nothing but in right of Alice his wife, mother of J. A. now plaintiff, and prayed to have right, which petition was indorsed, and sent to Chancery to do right, and sci. fa. was awarded against R. who came, and because his father had the land of the gift of the King, and that he is in by descent, prayed that the plaintiff sue at common law to save the warranty of the defendant. Ludd. said, We cannot have writ of entry against you, supposing that you had not entry unless by your ancestor, to whom the King leased, who wrongfully disseised our ancestor thereof; for the King cannot be a disseisor, and so the writ fails at common law; and because this suit was allowed in parliament, and also such suit was allowed in such Case for M.S. Shard ordered him to answer, whereupon the other prayed aid of the King, and had it by assent. Br. Petition, pl. 16. cites 33 Aff. 10.

5. Where the King seises land or resumes it after livery to a prior alien &c. for cause, which cause is of record in the reseiſer or resumption, a man shall have traverse to the cause, and scire facias against the party who has it. Br. Petition, pl. 4. cites 2 H. 4. 10. per Cur.

grieved shall have petition to the King, and scire facias against the party who has the land; and so it was done. Ibid.

[ 547 ]  
S. C. cited  
4 Rep. 55.  
b. 56. and  
that by  
award of all  
the Justices  
the writ was  
abated, be-  
cause no  
office was  
found for  
the devisee,  
and they  
bid the de-  
visee sue  
to the King  
But if he  
reseises or  
resumes  
without  
showing  
cause, there  
the party

But where  
it is found  
that J. N.  
was at-  
tainted of  
treason or  
felony by  
matter of re-  
cord before,  
and the King grants this land over to another, there he who right has cannot traverse, nor enter, nor  
have action, but is put to his petition. Br. Petition, pl. 36. cites 10 H. 6. 15.

6. If it be found before the escheator that J. N. did treason, by which the King seized, whereas he was never indicted nor attain-  
ed, he who is ousted by this means shall not be compelled to sue  
by petition, where the King has granted the land over, but may  
have scire facias to repeal the letters patent. Br. Petition, pl. 8.  
cites 8 H. 4. 21. per Gascoigne.

7. If the presentee of the King ousts the incumbent without in-  
duction, spoliatio lies for the incumbent; but if he ejects after in-  
duction, the incumbent shall have petition to the King, and scire  
facias against the presentee of the King; per Gascoign and Huls.  
Brooke says, This is to be understood as it seems where the  
King is intitled to the advowson by office. Br. Petition, pl. 44.  
cites 8 H. 4. 21.

[ 548 ] 8. If office be found which intitles the King to fee simple or  
franktenement, the party grieved shall not have traverse but pe-  
tition; per Babington J. quod nemo negavit, quod nota. Br.  
Petition, pl. 32. cites 8 H. 5. & Fitzh. Traverse 47.

9. It was found by office before the escheator who sat by vir-  
tue of his office, that J. N. gave in tail to P. rendring rent, and  
for default of payment a re-entry, and that the donor entered for  
non-payment, and was seized till by the issue of P. after the death of  
P. disseised, and the issue had issue N. and died seized, and after N.  
was attainted by act of parliament, and to forfeit his land in posses-  
sion and in use; and that after N. died, and that the donor made  
continual claim at the time of the death of N. which office was re-  
turned in the Chancery; and upon this J. N. the disseisee came  
and pleaded the matter above, and that in a proviso in the statute of  
attainder of saving to all lieges not attainted their right possession and  
lawful entry in all the land of the said N. who was attainted,  
and shewed the seisin and disseisin, and the continual claim and the  
dying seized, and the seisin in the hands of the King by office  
virtute officii, and prayed to remove the hands of the King. And  
by some he shall be put to his petition of right; but the \* best  
opinion was contra, and that he shall be restored by plea, because  
his title is found in the office, and by reason of the saving of the  
act. And it was said, that the office shall be received in the  
Chancery, tho' it be found against the King, as it is here, viz.  
the seisin and the disseisin, and the continual claim; for the  
jury ought to find the truth, and therefore it shall be return'd.  
As, where it is found that A. killed B. se defendendo, yet this  
shall be return'd, and the King shall make to him his grace; and  
see 4 E. 4. 21. Diversity. And so the best opinion here was  
that he may enter, or have oulter le main at least; and where  
the King enters by title or without title, which is without office  
as it seems, yet a man cannot enter upon him. Br. Office De-  
vant, &c. pl. 37. cites 3 E. 4. 24.

10. In the Exchequer Chamber Brian rehearsed how at an-  
other time it was found by office that the Duke of E. died seized of the  
manor

\* Br. Peti-  
tion, pl. 27.  
cites S. C.

manor of E. C. which descended to the King, and he entered, and after A. sued to the King by petition, inasmuch as he was seised of the manor till by the said Duke disseised, and process continued till he had restitution, which A. infeoffed B. and C. who gave to E. in tail, and now by another office it is found, that the said Duke died seised of 40 acres of land in E. C. and D. by which the King seised it and granted to J. S. and thereupon came E. the tenant in tail, and rehearsed all the matter, and said that the 40 acres are parcel of the manor, of which the restitution was made, and prayed restitution, and had scire facias against the patentee, who came and prayed writ of search. And per Spilman, In this case, where a man traverses an office, he may sue by petition, and if he sues by petition, the nature is to have search, but in its nature of *monstrans de droit*, as here, search shall not be granted; and so see here that the first matter was a petition, but this second matter is a *monstrans de droit*, and so admitted without contradiction. Br. Petition, pl. 15. cites 9 E. 4. 51.

11. Petition was made to the King reciting that the King had not title but by forfeiture of J. S. &c. and had scire facias against the patentee as well if it had been upon a traverse. Br. Petition, pl. 31. cites 16 E. 4. 6.

12. There is a diversity between *monstrans de droit*, petition, and traverse; for *monstrans de droit* is when the King is intitled by matter in fact which is true, and yet the party has right, as where the King's tenant is disseised, and the disseisor dies seised, and office is found &c. in this case he may confess the matter, and shew the disseisin, and pray that he may be restored, and this is good *monstrans de droit*. Br. Petition, pl. 20. cites 3 H. 7. 3. In all cases a grantee may intitle in a *monstrans de droit*, where lands come to the King by matter of fact, as upon a vacancy of a bishoprick &c.; and he need not resort to a petition, because his title is as high as that of the King. Skin. 613, 614. Mich. 7 W. 3. B. R. in the Banker's Case.—But if the King's title be by matter of record, there, at common law, the party was put to his petition of right; but where the King comes by lands by act of law, this is in the manner as before mentioned. Skin. 614. in the Banker's Case. [ 549 ]

13. Petition is, when the King is intitled by matter of record, as where it is found that one is attainted of treason, and is seised of certain land, in this case the disseisee shall have petition, and shew his title and the title of the King, and the King may traverse his title if he will. And if feoffment upon condition be made of the part of the feoffee, and he breaks it, and after is attainted of treason, the feoffor shall have his petition shewing the matter. And it seems that this is where the King is intitled by double matter of record, as the attainder and office found, of which land he was seised at the time of the attainder. Br. Ibid. Br. Prerogative, pl. 59. cites S. C.—For where the King is intitled by double matter of record, a man cannot traverse. Br. Office de vant, &c. pl. 37. cites 3 E. 4. 24.—Br. Petition, pl. 27. cites S. C.—S. P. For the King is not only intitled by the office, but by the attainder also; quod nota. Br. Petition, pl. 28. cites 4 E. 4. 25.—S. P. Ibid. pl. 35. cites 33 H. 8.—So if the King grants it over after the double matter of record found. Ibid.

If a man be attainted of treason, and be found to be seised of the land of another, the person is put out of possession, and before the statute which gave a traverse he had no remedy; but a petition of right; for an office is found upon oath, and is a judicial proceeding, where the party who has a title has a sufficient notice to come and make it appear; but now diverse statutes have given a traverse. Skin. 614. Mich. 7 W. 3. B. R. in the Banker's Case.—See (Q. 3) pl. 1. f. 6. And in notis, and pl. 2. per tot.

## Prerogative of the King.

14. And *traverse* is where the title of the King is false; and per Hufley, the party cannot traverse but where livery shall be made; for if it be found that A. held land for term of life, and died, the reversion to the King, there, if this be false, yet the party shall not have traverse, because livery does not lie in this case. Ibid.

15. Office was found that J. O. was attainted of treason by parliament in the time of R. 3. and that he forfeited to the King his land, and all that he could forfeit, and that he was seised of 1000 acres of land in Dale in fee, and the King seised. And S. O. came and said that at the same parliament it was enacted that he should be restored to all that which J. O. his ancestor forfeited, and the attainder against J. O. annulled; and said that J. O. was seised of those lands at the time of the attainder, and prayed restitution; and by all the Justices, where the King is intitled by matter, he shall be put to his petition, and shall not have traverse; and this seems to be double matter of record as here, that is to say, the attainder by parliament and forfeiture of his land, and the office finding that he was seised of this land at the time of the attainder, he shall not have monsttrans de droit, where the King is intitled by matter of record as above; but in this case he confesser and avoids the title of the King by as high matter of record as the King is intitled by, and therefore he is not put to his petition; for his petition is by the act of parliament; by all the Justices without question, and he shall have it by way of plea, and shall have the land; quod nota. Br. Petition, pl. 23. cites 4 H. 7. 7.

16. If two jointenants are, and it is found by office that the one was seised in fee, and the land descended to W. his son, as heir &c. the other has remedy by monsttrans de droit, which shall be in this manner, viz. he shall come into the Chancery, and shall shew all his matter, and pray allowance of it, and shall have it; quod nota. Br. Petition, pl. 25. cites 9 H. 7. 24.

*Anfonedewise houses in London devisable by custom, and held of the*

17. Estate vested in the King shall be defeated by force of a condition by act in law without office or monsttrans de droit. Cited 2 Rep. 53. Pasch. 29 Eliz. in Scacc. in Sir Hugh Cholmley's Case. As Pl. C. 489. Lord Lovell's Case.

*King in tail, and if the donee dies without issue, that the land should be sold by his executors, and died, the devisee died without issue, now the land is escheated to the King, yet the bargain and sale of the executors shall devise the estate of the King for necessity, and this without petition or monsttrans de droit; and also their vendee is in by the devilor paramount the escheat. Cited 2 Rep. 53. Pasch.*

[ 550 ] 29 Eliz. in Scacc. in Sir Hugh Cholmley's Case, as 49 E. 3. Isabel Goodcheap's Case.—And Ibid. 53. it is said, Arg. That in as much as the executors in this case having only a power, they had no other means but only to sell; for they could not have petition, monsttrans de droit, or other remedy.—But it was said that if land upon condition comes to the King, and the condition is broken, and the King makes a lease for life, he who has the condition cannot enter, but ought to have petition or monsttrans de droit &c. and this appears in the book of 9 H. 4. 4. a. b. a man bound in a statute conveyed land to the King who leased for life, the consue shall not extend upon the possession of the tenant for life. 3 Rep. 53. b. in Sir Hugh Cholmley's Case.

18. When an estate shall be devised out of a common person, and vested in another without action, entry or claim, this shall be devised out of the King without petition or monsttrans de droit &c. But when in the case of a common person, the estate shall not be

be devested out of him without action, entry, or claim, there it shall not be devested out of the King without petition or monstrans de droit &c. 2 Rep. 53. in Sir Hugh Chomley's Case. —cites Pl. C. 489. Lord Lovel's Case.

19. It was found by mandamus that A. was seised on the day of his death of certain mesuages &c. in London, and died without heir, and that they were held of the Queen in socage. The warden and commonalty of saddlers in the Chancery shewed their right, that long time before A. any thing had therein, one J. S. was seised of them in his demesne as of fee, and so seised by will devised them to the said wardens &c. in fee, and were seised till by the said A. disseised, who so seised died without heir, and shewed the custom of London for a freeman to devise in mortmain, and that J. S. was a citizen and freeman at the time of his death. Upon a demurrer, the question was, if monstrans de droit lay in this case, or that they were put to their petition? It was resolved that in all cases at common law, when the King was seised of any estate of inheritance or franktenement by any matter of record, or by matter in fact and found by office of record, he, who right had, could not have any traverse upon which he was to have an amoveas manum, but was put to his petition of right to be restored to his franktenement and inheritance. But when the title of the King was by matter in fact, as by reason of purchase by an alien-born, or by the King's villein, or alienation in mortmain, or death of his tenant without heir &c. if, \*in the same office found for the King, the title and interest of the party was found likewise, there the party grieved at common law might have his monstrans de droit, because his title appears by the same record by which the King is intitled. 4 Rep. 54. b. 55. a. Trin. 30 Eliz. in Canc. The Warden and Commonalty of Saddlers in London.

S. C. And. 180. 181. That it was agreed by all the Justices except two; and this upon conference at Serjeant's Inn, that remedy might be in this case by monstrans de droit, because the same is to be so understood by the words of the statute of 36 E. 3. which gives the traverse and monstrans de droit.

\* As if disseisior alien'd in mortmain, or to alien born, or to the King's villein, or dies without

heir, the land being held of the King, and the whole special matter is found by office, viz. the disseisin and the alienation, or dying without heir, the party grieved should have monstrans de droit at the common law. 4 Rep. 55. a. and says that so are the books to be intended in 9 E. 4. 5. and 13 E. 4. 8. a. 41. 21.

And it was further resolved, that when the King's tenant seised of land in fee dies without heir, the fee and franktenement is immediately upon his death, and before office found, cast upon the King, and has not a franktenement in law only, as a common person in like case has. But when a stranger is seised, and in possession at the time of the escheat, so that possessio est plena & non vacua, there the King shall not be adjudged in possession till this seisin and possession be removed. 4 Rep. 56. a. in the Warden &c. of Sadler's Case.

20. When the whole truth of the case appears in the office there was monstrans de droit at common law. 4 Rep. 55. a. in Case of Warden &c. of Sadlers.

So if land was conveyed to the King upon condition, if

the performance is of record; as if the condition be to levy a fine of other land to the King, or to make recognizance to the King in any Court of Record, or other like conditions which are to be perform'd of record, the performer may have his monstrans at common law; for his title appears of record, and there is no record which absolutely intitles the King; but if the performance be not of record, but it be found by office, he shall have monstrans de droit by the common law. But if the office finds title for the King only, and omits the right or title of the party, tho' all the words of the office be true, yet by the common law he could not have monstrans de droit, but was put to his petition. 4 Rep. 55. a. b.

21. King Char. 2. being indebted to diverse persons in the sum of 416,000 l. 8s. 2d. for the payment of the interest of that sum, grants for him his heirs and successors 25,000 l. per ann. to be paid out of his revenue of the hereditary excise to Sir R. V. in trust for such creditors of Sir R. V. who would deliver their securities and take assignments for their debts; and directs the Office of the Exchequer to strike tallies, and upon receipt of the revenue of the excise to pay them immediately &c. *Proviso on payment of the principal sum to be void.* W. one of the creditors of Sir R. V. took an assignment of part and delivered his security, and this assignment was enrolled; and he brought the letters patents and assignments into the Court of Exchequer, and prayed them to be allowed, and that he might be paid his arrears and growing interest for the future. The attorney-general demurred. And, per Holt Ch. J. W. had taken a proper remedy; and he said, first, that monstans de droit, and petition of right, were the remedies in such case at the common law; and that monstans de droit is enlarged by several statutes, and except in a few cases a traverse lies, 4 Rep. 54. 2 Inst. 688. Stamf. Prerogat. 74. But this case is not within any of the statutes, but is at common law; and the party in this case is not put to his petition of right, but monstans de droit is his proper way; a petition of right is not necessary, tho' the party may admit himself out of possession, as in the case of a tenant in tail of a rent, who may have a formedon, and then a warranty would bar him, but this is not necessary; so here if the party will admit himself out of possession, he might have a petition of right. 2d, A petition of right is not necessary, because a petition of right is grounded upon a matter of fact suggested, upon which a commission issues to enquire of the truth of this suggestion, except the attorney general confesses the truth of the matter suggested, as in a petition of dower, 3 Inst. 215. Moor. 639. Co. Ent. 462. 9 Hen. 4. 4. But here no matter of fact is to be inquired of, but his title is by letters patent, which are matters of record; it is true that W. claims under Sir R. V. but he claims by deed enrolled, directed by the patent; neither does the patentee go to destroy the title of the King; but this is an affirmation of the King's title, and in all cases of a petition to the King, this is to controvert the title of the King; the case might have been so, that a petition might have been necessary; as if Sir R. V. had been attainted before the assignment inrolled, and after the grant made, and a seisure had been made into the King's hand, the party ought to go by way of petition; for in no case is the party put to his petition but when he controverts the title of the King, but here the annuity is not put to a right; nothing is done to turn the subject's title to a right, and therefore there is no reason to have a petition; also as a petition is not necessary, so the remedy here pursued is proper, viz. a monstans de droit, which is a remedy at common law; cites Kell. 178. and 4 Rep. 55. and if it be demanded when is such remedy to be pursued? it may be answered, when the title appears upon record; as suppose an inquisition found a title for the King; as also one for the

the party, as in the case of an alienation in mortmain by a disseisor; Saddler's Case. 4 Rep. And that a monstrans de droit *lies in the Exchequer*, appears in Sheffield's Case, and is admitted in the Com. 186. Coke's Entr. 205. (tho' 26 E. 3. does not mention the Exchequer,) for it lies in some cases there by the common law; and *at this day a monstrans de droit lies only in Chancery and the Exchequer, except in a special case.* Skin. 601, 608, 609. Mich. 7 W. 3. B: R. The Banker's Case.

## (Q. 12) Scire Facias for the King; Necessary, in [ 552 ] what Cases.

1. **I**N all cases where a common person is put to his action, there, upon office found, the King is put to his scire facias, *as in case of waste, cessavit &c.* But when a common person may enter without seisure, there office without scire facias shall suffice for the King. 9 Rep. 96. b. Pasch. 9 Jac. in Canc. in Sir George Reynell's Case. — cites \* 12 H. 7. 21. b. 14 H. 7. 2. 15 H. 7. 6. b. Stanf. 54.

\* Poph. 271  
cites S. C.  
and P.

## (Q. 13) Proceedings and Pleadings in Petition and Monstrans de Droit.

1. **I**F the King grants land to another, there he, who makes petition, or monstrans de droit, or traverses the office, shall have *scire facias against the patentee*, and both the King and the Party shall be parties, and therefore the patentee shall not have aid of the King; for he shall be made party. Br. Petition, pl. 37. cites 9 H. 4. 51.

2. The Justices of B. R. may proceed to the examination of the matter by themselves, *if the petition contains that the King commands them to examine it*, and this *without original out of Chancery*; but *if the petition concludes that they shall do right*, there they cannot proceed without original out of Chancery; note the diversity. Br. Petition, pl. 34. cites 10 H. 4. and Fitzh. Traverse 51.

Brooke says  
this original  
seems to be  
a petition of  
right in Latin,  
whose  
form commences  
thus,  
viz. *Supplicavit*

*causit humilime vestre celsitudini regie &c.* and so to show his matter as his case is, which is used to be indorsed by the King to the Chancellor, that he do right, and then the other party shall answer in Chancery; and when they are at issue upon a demurrer, it is used to be sent out of Chancery into B. R. there to be tried and adjudged. Ibid.

3. The abbot of L. sued petition of right to the King, that where R. M. before time of memory founded the abbey of L. and conveyed the foundation by descent to S. M. who was attainted in the time of H. 3. for levying war against the King, by which the King seized the advowson and patronage aforesaid, and conveyed it to King E. 3. and that he writ to the abbot to have corody for W. and that this shall not be prejudice to the abbot afterwards to have other corody, and conveyed to King R. 2. and that at his

desire A. was admitted to the corody there, and conveyed to King E. 4. and traversed *absque hoc* that the King was *patron in jure corone*, or that it was of the foundation of the King, or his progenitors, Kings of England; and *absque hoc* that the King had ever other possession of the corody, unless in *forma prediæ*, and prays the King to do him right; by which it was indorsed and sent into the Chancery, and commission was awarded to inquire of those matters, which was returned accordingly, and the King's attorney demurred in law for four causes; 1st, *Because it is alledged that the King was not founder, which is one matter.* 2dly, *He shows another matter in which King E. 3. discharged the corody by his letters patents, and after King R. 2. obtained possession.* 3dly, *That R. M. founded the abbey before time of memory, which cannot be try'd.* 4thly, *Because it does not appear in the petition that the King, who now is, has any valet there, and therefore they are not grieved.* And yet the petition was held good, because *the first matter of King E. 3. was only a recital, which was admitted: and it is good notwithstanding the allegation of foundation by R. M. before time of memory, for it is conveyed after to S. M. and is sufficient matter within time of memory to be try'd; and by some the plaintiff shall not have petition till he be grieved by admitting the valet to the corody, which is not so; for the King, by intitling by office of foundation, is in possession of it till it be discharged by petition, and the conclusion of the petition ought to be to pray that the King discharge him of the corody and to do him right; and after by the Justices the petition is good, notwithstanding that it does not prove that the King has valet admitted to the corody; but otherwise it is in petition of land; for there, if the tertenant of the grant of the King be not named in the petition, he shall not have *scire facias* against him after to remove him.* Br. Petition, pl. 26. cites 5 E. 4. 118.

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*But if petition be found against the party, he shall be barr'd of all titles before for the petition to the*

4. Every petition ought to make \* mention of all the titles of the King, and if any be omitted, the petition shall abate; and where issue upon petition is taken between the King and the party, and passes against the King, he shall be concluded of all titles in the petition expressed, but not of other titles which are not expressed; for the judgment is, *Salvo jure Regis &c.* Br. Petition, pl. 15. cites 9 E. 4. 51. Per Sottel.

*King is the writ of right of the party; and for eschewing delays the statute has ordained, that the party may traverse the office.* Ibid.

In petition all conveyances and acts which give possession to the King ought to be expressed; as to the King in this ought to be informed of all the titles, and this certainly, and not generally; as to say that divers persons were seized &c. or the like, and otherwise the petition is not good. Br. Petition, pl. 21. cites 3 H. 7.—\* S. P. But after judgment, to find such a fault, he must have a *scire facias*. Cited Godb. 304. in Case of Lord Sheffield v. Ratcliff, as 16 E. 4. 7.

5. Petition was sued and was indorsed to the Chancery, and had commission, by which it was found for the King and not for the plaintiff; and Brian and Fairfax held that he shall have *new commission*, and that his plea is determined because it is found against him; and Townsend thought that he might have a *new petition* or sue a new commission; for the petition is to no purpose till

'till he has commission which serves for him, and then he shall come into Chancery and maintain the petition and traverse the title of the King, and there the \* King may chuse if he will maintain his title or traverse the title of the plaintiff, and if the plaintiff be nonsuited after issue joined this is peremptory; and after the Court held the new petition good, and that he shall have new commission thereupon. Br. Petition, pl. 22. cites 3 H. 7. 13.

\* Br. Prerog. pl. 60. cites S. C. accordingly. — S. P. Contra of a common person. Ibid. pl. 20. cites 3 H. 7. 3.

6. You cannot have a writ of error to be brought in parliament, but of necessity you ought to have the King's hand and his licence for it, otherwise you can have no writ of error there. Per Coke Ch. J. 2 Bulf. 162. Pasch. 12 Jac. B. R. Heydon v. Godsalve.

7. A writ of error may be against the King without petition, tho' anciently that was used and was a decency; but since 1640, writs of error have been made out ex officio. 1 Salk. 264. 1 Will. 3. Per Holt Ch. J. Anon.

8. A monstrans de droit lies in the Exchequer, as appears in SHEFFIELD'S CASE; and is admitted in the Com. 186. Coke's Entr. 205. (tho' 26 E. 3. does not mention the Exchequer); for it lies in some cases there by the common law; and at this day a monstrans de droit lies only in the Chancery and the Exchequer, except in a \* special case. Skin. 609. Mich. 7 W. 3. B. R. in the Banker's Case.

\* A monstrans de droit was brought in B. R. because the record of the conviction and seizure were there.

Skin. 610. Mich. 7 W. 3. B. R. in the Banker's Case.

9. When a man is put out of possession by virtue of an inquisition returned for the Queen, and another comes and pleads his right, that is a distinct record from the inquisition; and so if a third comes and pleads his right, that is another distinct record; and if demurrer be to all, then it is determined there, or may be sent into B. R. to be argued and determined; but if issue be joined in it, then the way is to award a venire facias out of Chancery, returnable at a day certain out of B. R. and the record is delivered in B. R. by the hands of the Chancellor &c. to be there at the day of the return of the venire facias; but the inquisition is never sent thither; but the party comes into Chancery and complains of his being aggrieved by the inquisition, and prays he may be admitted to shew his right and plead against the inquisition, and that is a monstrans de droit, and all the operation of the inquisition is to make title for the King; and the party comes in as plaintiff, and either traverses it, or shews his right consistent with it, and if he will traverse it he must shew title in himself. The Case of JEFFERSON v. DAWSON was part on demurrer and part on issue, and if there be a mispleader, and a replender awarded, that must be in B. R. and where there is issue and demurrer, and the party will not proceed on the demurrer, the Court will give judgment on the demurrer. Per Holt. Farr. 32. Trin. 1 Ann. B. R. The Queen v. Mason.

If the Inquisition be fulfilled, it shall be set aside so far as to make way for the plaintiff's right; and

[ 554 ] if the party's right can be collected from the inquisition, it shall be affirmed by the judgment; so was Holland's Case, and so is Kelw. 93. 2 Salk. 448. the Queen v. Mason. The monstrans de droit recites

the inquisition, and concludes, Prout patet per recordum inquisitionis in filaciis curie cancellarie, and may set forth the inquisition with an inter alia, and eyer may be crav'd of it. 2 Salk. 448. Trin. 1 Ann. B. R. The Queen v. Mason.

Sec (Y. d). (Q. 14) *What shall go to the Successor, or to the Executors.*

1. **THE** King shall have *presentation fallen in the time of another King*, and not his executor. Br. Quare Impedit, pl. 47. cites 7 H. 4. 25. 37.

2. *Chattel shall descend in the Case of the King.* Br. Petition, pl. 7. cites 7 H. 4. 33.

\* *Prisage is a custom taken of wines of all sorts, and is in certainty, viz. two tons of wine out of every ship laden with 20 tons or more; one ton is to be taken before the mast of the ship, and the other behind the mast. And because this custom is part of the merchandise imported, it is called prisage. And this custom was payable in England by all merchants, denizens and*

† Fol. 163.

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*by aliens before the charter of 20 E. 1. by which the King demised to the merchant strangers all prises; and in the same charter is pres'd,*

(R) \* *Prisage.*

[1. Rot. Parl. **THE** commons pray, that as of ancient time 2 H. 4. 109. grant was, that the King, who then was, and his heirs should have of every ship laden with 30 tons of wine or more, two tons in name of the prise in every port of England, according to what was accustomed and used in every port, till *John Waltham late bishop of Sarum in time of King R.* was treasurer of England, terribly without authority of parliament made the butler, who then was, to take in every port within the *south and west*, of every ship carrying 20 tons or more, two tons for the prise, against the usages and customs in the said port used in the time of the most noble E. 3. or in any time before, and against the grant made in parliament the first time that the prisage was granted to the King, who then was, in great destruction, oppression and ruin of the open estate of the merchants and mariners throughout all the south and west parts of England; and notwithstanding that judgment was given by the Barons of the Exchequer in the 16th and 17th year of R. 2. against Thomas Costome and others merchants of Bristol, and against Thomas Tanner of Wells, Philip Batt of Bridgewater, William Portman of Taunton, and several other merchants, that they ought to pay of every ship carrying 20 tons or more two tons for the prise, as appears by the records of judgments aforesaid; whereupon the commons in the last parliament held at Westminster before this present parliament †, among their petitions prayed our most dread lord the King, that they ought to pay their prise of wines in the manner which they were used to pay in the time of the most noble King E. 3. or in any time before, notwithstanding any judgment given in the Exchequer, or other ordinance made by the said treasurer, or any other in the time of the said King Rich. to account of the usages aforesaid. To which petition the King who now is, by advice of the Lords and others of his most wise council in the said last parliament, granted of his special grace that the prise should be paid from henceforth as it had been used heretofore, as appears by the answer of the same petition. And notwithstanding the grant of our lord the King in the parliament

ment above said, the deputies of the butler who now is, in every of the ports afore said, take of less number than of 20 tons, being in one ship, one ton for the prise, against all judgment, usages, or any other ordinance made to the contrary, that it please our lord the King of his special grace to grant in this present parliament, that the butler, nor none of his deputies, henceforward take the prise in any other manner than has been paid before the said last parliament. And if the butler, or any of his deputies, do the contrary, that prohibitions needful be ordained and granted in the case. Answer, Be the use as it has been heretofore, and the right of the King || saved of his part.]

that in consideration thereof the merchant strangers have granted to pay to the King and his heirs, in the name of custom, two shillings of every hog-shead of wine brought or

caused to be brought by them into the kingdom &c. which said custom of two shillings is now here in England called \* *butlerage*, and payable there by all merchant-strangers. Dav. Rep. 8. b. Mich. 5 Jac. B. R. in Ireland, in the cases of Customs.—*Prisage* is a custom due by ++ *prescription*, and parcel of the ancient inheritance of the Crown. and, that he has an inheritance in it, appears by the charters granted to the citizens of London and those of the cinque ports, to be discharged thereof in all ports for ever. Dav. Rep. 10. a. the case of Customs.—It is a royal prerogative due time out of mind as an incident to the Crown, but yet not inseparable: it is due for the King's provision, and to be delivered to the King's chief butler. Per Fleming Ch. J. 3 Bulst. 8. And per Croke J. Ibid. 3. This prisage probably grew from this, that the King was to scour the narrow seas. Hill. 12 Jac. in Case of Sir Thomas Waller v. Hanger.—\* S. P. Mo. 832. Pasch. 9 Jac. B. R. Sir Thomas Walter v. Hanger.—S. P. 2 Molloy 283. cap. 8 f. 8.—It is called *butlerage*, because the King's chief butler receives it. Ibid. *Prisage* is the wine in kind, and *butlerage* is the imposition or other consideration given for the wine. Mo. 833.—++ S. P. And not by the common law. Per Coke Ch. J. 2 Bulst. 253. Trin. 12 Jac. in Case, of Kenicot v. Bogan.—And by 5 & 6 E. 3. it is a thing against common right. Ibid.

*Prisage* is a certain taking or purveyance for wine to the King's use; and the same is an ancient duty which the Kings of England time out of mind had and received; the manner hath been by taking of every ship or vessel that shall come into this realm, if 10 ton, to have for *prisage* one ton, and if it contain 20 ton or more, to have two ton, (viz.) unum ante \*\* *dolium*, and the other deorsum paying 20s. for each ton. This ancient immunity they have enjoyed as a flower of the Crown, and by some has been conceived not grantable away without act of parliament. But yet in 6 E. 3. fol. 3. Case 15. mentions the same to be grantable over. 2 Molloy 281. (bis) cap. 8. f. 1.

+ Orig. (del over.)—+ Entour les communs petitions prieront nostre tres doubt.—|| Orig. (fausse celle party.)—\*\* This seems to be misprinted for (malum.)

[2. 25 E. 3. Rot. Parl. N. 52. A petition by the Commons that the butlers of the King shall not take more wine than is necessary, and to a certain number of tons in every port. Quere, whether this was for *prisage*, or *purveyance*.]

Prynne's Cotton's Records, Abr. 81. No. 52. says, the print for

taking wines for the King, cap. 12. agrees with the record.

3. 1 E. 1. Claufo Memb. 5. Certain merchants claimed to be of the liberty of the five ports, and therefore not to pay *prisage* of wine, and thereupon upon surety their goods were bailed to them; and ibid. \* Soon after, the *Barons of the cinque ports* claimed to be free of prise of wine by *prescription*.]

\* Orig. is (Proch. a-pres.)

(R. 2) *Prisage. Payable, by whom.*

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1. Information was exhibited in B. R. by W. against H. containing that King E. 3. by patent anno 1 regni sui, reciting that whereas he had of every 10 tuns of wine imported within this realm one tun, and of 20 tons two tons, the one before, the other

See 3 Bulst. 1. to 26. S. C. and the arguments.—

X x 4

And ibid. pag. 50. Croke J. said, If the bulk of the ship was opened before the testator's death, his executors may well take and carry the wine without the payment of prisage, because it was discharged by the opening in the life of the testator—S. C. cited Noy. 97. in Case of LAMONGER v. NEW-

SAM, as SIR THOMAS WALKER'S CASE, who says it was adjudged that where a freeman of London imports wines, and before the landing of them he dies, his executors shall not pay prisage, altho' the executor was not a freeman; which Doderidge J. also affirmed.

If a citizen has a factor beyond sea, who has sold all the commodities, and converted them into money, and then the citizen dies, and after the factor buys other goods with the money, they shall not be discharged of prisage, because the testator was never possessed of them in his life. And so it shall be (as was said at the bar by Yelverton) that if executor trades with the stock of the testator, and imports goods, he shall pay prisage. Per Doderidge J. quod fuit concessum per Coke Ch. J. Roll. R. 143. Hill. 12 Jac. S. C. by name of the King v. Hanger.

\* A freewoman is within the charter; per Doderidge J. and per Coke, so it is of an apprentice in London. Roll. R. 136. Hill. 13 Jac. in Spencer's Case.

By this grant to the corporation, they shall have benefit thereof, every one in his natural capacity; but it seems that upon this grant,

if the city of London trade in their politick capacity, they shall not be privileged from prisage within this patent; for this was \* not the intent of the patent; per Doderidge J. and this diversity was granted per Yelverton Solicitor, who argued for the King. And it was agreed per tot. Cur. that every citizen shall have advantage of this charter in his natural capacity. Roll. R. 142. Hill. 12 Jac. B. R. S. C. by name of the King v. Hanger.

Calth. 31. &c. S. C. \* One had a shop and servant at London, (being a

other behind the mast; now he granted *majori & civibus London, quod nulla prisagia sint soluta de vinis civium & liberorum hominum London &c.* George Hanger, a citizen and freeman, had wines in the port and others upon the sea and died, making the defendant, his feme, his executrix, and the information charged her to pay the prisage for all those wines. She pleaded that she was a \* free-woman of London, and pleaded the charter &c. upon which the plaintiff demurred in law. And the question was, if the executor of a citizen had the privilege to be discharged for the goods of the testator? and in this the Justices varied, and were equally divided in their opinions. But it seems the better opinion that the executor shall be discharged. And a doubt was, if the executrix should be discharged as well for those wines which were upon the sea coming to the port in the life of the testator, as for those which were in the port at the time of his death. And Coke, Doderidge, Williams, and Yelverton, agreed that the executrix should be discharged of such wines also, because the privilege goes in discharge negatively, and the privilege runs to the wines principally, and to the person, and the executrix is possessed by representation of the person of the testator for the goods, as appears inasmuch as he cannot forfeit the goods. Mo. 832. Pasch. 9 Jac. Sir Thomas Walter v. Hanger.

2. But it was resolved by all, that the charter made *majori & civibus*, shall not enure to the body politic of the city, but to the particular persons of the corporation; because the words are (*quod nulla prisagia soluta sint de vinis civium & liberorum hominum*), which makes the patent in fruit and execution to be applied to citizens and freemen, and not to the wines of the body politic of the city. Mo. 833. In Case of Sir Thomas Walter v. Hanger.

3. It was likewise resolved by all, that he, who is \* *civis*, & *liber homo* to take benefit of this privilege, ought to be free of the city, and also an inhabitant within the city, and also to be a *paterfamilias* within the city; for one may be free of the city and not *civis*, as if he removes and lives elsewhere, and he may be a citizen

izen by habitation and yet not free, and he may be a citizen and free, and not a house-keeper; and in all these Cases he shall not have this privilege. Mo. 833. In Case of Sir Thomas Walter v. Hanger.

citizen of London) but his residence and family was at Bristol;

and therefore it was adjudged that he was not *civis* within the patent, to be discharged of prisage, because he was not *subject to foot and lot*. Roll. R. 143. in Case of the King v. Hanger, cited by Coke Ch. J. and agreed per tot. Cur. as Trin. 4 H. 6. *inter communia placita in scaccario*, Rot. 14. —S. C. cited by Croke J. 3 Bullst. 4. in Case of the King v. Hanger, as 4 H. 6. Knowls's Case.—S. C. cited by Doderidge J. Ibid. 16. in S. C.—So if he be a citizen and freeman of London, and dwells there as a *lodger*, but keeps no house, this charter of discharge shall not extend to him. Ibid. 16. cited by Doderidge J. as adjudged in the Exchequer. Hill. 43 Eliz. Rot. 22. in Case of Sacheveril and Suede.—Same cases cited 2 Molloy 282. (bis) cap. 8. f. 4 & 5.—Coke Attorney-General put this difference of citizens, viz. that there is a *citizen nomine*, a citizen *re*, and a citizen *re & nomine*. But it was resolved that only the citizen *re & nomine*, viz. he who is a freeman of London, and is also an inhabitant, and pays foot and lot, shall be free of prisage by the said charter. Day. 10. b. Mich. 5 Jac. B. R. in Ireland, in the Case of Customs.

4. The charter extends to the goods of which a citizen is sole owner; for if a citizen has goods jointly or in common with another who is no citizen, there prisage shall be paid for all the goods; for otherwise the stranger shall have benefit of this patent against the intent of the King. But if two citizens have goods jointly or in common, they shall be discharged. Per Doderidge J. and this diversity was agreed per Coke Ch. J. Roll. R. 142; 143. Hill. 12 Jac. B. R. The King v. Hanger.

And per Doderidge J. he who shall have the benefit of this charter, ought to be the intire owner; for a citizen who has goods in

pledge, shall not have the benefit of this charter, because he has only a special property; nor if a citizen pledges goods to another, he shall not have the privilege of those goods, because he has only the general property, and not the entire property; and this diversity was also agreed per Coke Ch. J. Ibid.—And per Doderidge, he who shall have benefit of this charter, ought to have the true property of the goods; for if a stranger brings in goods here, and sells them to a citizen, to the intent that he should sell them again to him after the unloading, he shall pay prisage. Also he who shall have benefit of this charter ought to continue proprietor of the goods, without alteration of the property or disability of his person, otherwise he shall not be discharged; as if before it is unladen, and after it is come in, he be disfranchised; for there the person is disabled by his own act, and therefore shall not have benefit of this patent. And all this was agreed per Coke Ch. J. who said that he, who would have benefit of this charter, ought to have proprium in the goods *quod modo*. Ibid.—And per Doderidge J. and agreed by Coke Ch. J. Ibid. 23. in S. C.—Calth. 33. & S. C.

5. It ought to be a merchant who shall pay prisage; for if a man brings wines over the sea here for his own use, and not to sell again, without doubt he shall not pay prisage. Per Coke Ch. J. Roll. R. 145. Hill. 12 Jac. in Case of the King v. Hanger.

Calth. 33. & S. C.

6. If a foreigner brings a ship laden with wines into the port of London, and then makes a citizen his executor, and dies, he shall not have benefit of this immunity from payment of prisage for these wines, because they are not bona civium. 3 Bullst. 7. Hill. 12 Jac. In Case of the King v. Hanger.

S. P. 2 Molloy 282. cap. 8. f. 6.—S. P. And so if a citizen of London that hath wines

abroad coming into England, makes a foreigner his executor, and dies, and after these wines return home; now tho' these wines are assets in the hands of the executor, and are in appellation the goods of the first citizen, yet they are [not] such wines as are capable of the discharge of prisage within the charter. Calth. 33. & S. C.

7. If one, at the time that he freighteth, be not a citizen in all degrees, tho' afterwards, before the return of the ship, he be enabled in every respect, yet he shall not enjoy the benefit of the charter, inasmuch as he was not so at the time that the ship was sent abroad. Calth. 33. &c. In Case of Waller v. Hanger.

S. C. cited  
by Hale Ch.  
B. Mich.  
24 Car. 2.  
in Scacc.  
in Case of  
Waller v.  
Traversa.

8. The King granted to a Venetian merchant to be quit of all customs, subsidies and impositions, and of all other sums of money due and payable for whatsoever merchandizes to be imported &c. and that he should be as free as the citizens of London. He is not hereby discharged of prisage, because prisage is not specially expressed in the same grant. Dav. Rep. 17. a. cited by the Lord Ch. Baron, as adjudged in the Exchequer in England.

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9. A stranger shall pay butlerage but not prisage, and an Englishman shall pay prisage but not butlerage, and a citizen of London shall pay neither of them; per Coke Ch. J. 2 Bull. 254. Trin. 12 Jac. in Case of Kenicot v. Bogan.

See (R. 2)  
pl. 5.

(R. 3) Prisage; payable in what Cases, &c.

1. 1 H. 8. cap. 5. f. 6. ENacts that no citizen of London, or other subjects inhabiting the cinque ports, or other, being free of prisage or butlerage by grant, custom, or otherwise, shall custom wines of any person not free of prisage or butlerage.

8. 7. If any do so, he shall forfeit to the King the double value of the prisage.

2. If wines should be made in England, as in times past they have been, and they should be transported from one port to another to be sold, no prisage shall be paid for them. Calth. 33. &c. in Case of Waller v. Hanger.

So where a merchant in several vessels laden at the same time, and at Amsterdam, imported into the same port here, viz. that of Hull 10 tons and more of sack and rhenish wines. The Chief Baron conceived that prima facie this should be intended fraud, being imported from the same place to the same

3. Bill was preferred in the Exchequer for prisage against S. who had imported nine tons and a half of wine, in which case it was argued that prisage ought to be paid as well as if there had been 10 tons; for otherwise merchants will import but such quantities in every vessel on purpose to defraud the King; so that it is fraud apparent. The defendant in his answer deny'd the fraud without any proof. And upon shewing of precedents, viz. 11 May 15 Car. SIR WILLIAM WALLER and others v. DERRICKE, and Pasch. 6 Car. and Mich. 9 Jac. SIR THOMAS WALLER v. POOL, and 16 Jan. 13 Jac. SINGLETON v. GAMMON, and 28 June 8 Car. SIR WILLIAM WALLER v. ATKINS, in the books of decrees in this Court (by which it appeared that the Court had declared such importations apparent fraud without proof, and declared against them, and gave notice accordingly to all merchants in all ports of England); and also upon view of an ancient account in Mich. 16 E. 3. in this Court, of prisage taken upon the importation of nine tuns only in a ship called the Trinity of London; the Court declared this to be fraud apparent, and decreed prisage to be paid, but if under nine tuns be imported, no prisage is due, as was agreed by the Court.

Court. Hard. 56, 57. Pasch. 1656. in Scacc. Attorney General v. Shirt.

sels, and consigned to the same merchant, and belonging to the same owner, unless there be some proof to the contrary to disprove these presumptions, as that one vessel was not sufficient to import all, or was almost laden before, or the like; et adjournatur. But afterwards the Court held it to be fraud upon the said circumstances. Hard. 218. Mich. 13 Car. 2. in Scacc. Sir William Waller v. Topham.

If nine tuns only be imported, prisage has very rarely been allowed without apparent evidence, and proof of a fraud. But where less than nine tuns are imported, prisage is never paid, and as it is an equitable construction against the letter of the law that nine tuns and half should pay prisage, so by equity if ten tuns be laden, and by leakage nine tuns only are really imported, no prisage is to be paid; for here is equity against equity, which must take place against the King as well as for him. Per Hale Ch. B. Hard. 477. Hill. 19 & 20 Car. 2. Attorney General v. Hornham.

4. A merchant imported a large quantity of wines into Bristol, and for not paying prisage an information was brought. He pleaded that, at the time of importation, and long before, he was, and still is a citizen of London, and that B. 1. by charter granted to the citizens of London, that no prisage should be taken of the wines of the citizens of London against their wills, but that they should be quit thereof for ever. Upon this the question was, if prisage should be paid for citizens wines out of the city? And decreed that prisage be paid; for the grant being by indefinite words do not import an absolute universality. Hard. 301. to 311. Mich. 14 Car. 2. in Scacc. Sir William Waller v. Travers.

But if a ship laden with wines for a citizen of London intitled to an exemption from payment of prisage, should by stress of weather be forced into any other port. In

such a case a citizen shall enjoy his privilege as well as if the ship had arrived in the port of London. Per Hale Ch. B. in Case of WALLER v. TRAVERS, and said it had been so held 25 E. 3.

5. If a foreigner arrives with a ship laden with wine at a port with an intent to unlade, and before the goods are entered, or bulk is broken, he sells them to a citizen, prisage shall be paid notwithstanding; for it was never the King's grant to discharge a citizen in such a manner. 2 Molloy 282. cap. 8. f. 6.

6. If the King discharges such a ship of J. S. being at sea, particularly naming it, from payment of prisage, and he dies before the ship arrives, no duty can be demanded. 2 Molloy 282. cap. 8. f. 7.

7. The cinque ports are discharged of prisage; yet if a citizen of Salisbury should consign wines to be delivered and unladed at Dover, the bare discharge of the goods at that port will not acquit the importer from the duty; for it is not the party's importation, but his domicile, that qualifies him for the benefit of his immunity. 2 Molloy 284. cap. 8. f. 11.

#### (R. 4) Prisage; Payable at what Time, and how.

1. SIR J. Y. farmer of the prisage of wines in Bristol, complained that the citizens and merchants of Bristol refused to allow him his prisage, viz. one tun before the mast, and another

another behind the mast, such as he would choose, but would give him vinegar for wine, and the vessels are not full. Per Morison, he shall have his *election*, and the *customer* is to be blam'd; for he *ought not to make entry of any wines before the prize-wine be deliver'd*; for then the wines are forfeit. And there is an allowance of 10 tuns in 100 tuns for leakage, therefore the merchant ought to empty his vessels to the butler; and so he said it was used at Hull where he was under butler. By which the Court wrote to the merchants to permit him to choose his wines, and to empty their vessels. Sav. 33, 34. Mich. 24 & 25 Eliz. Sir John Young's Case.

If the merchant at a haven unlade but one tun, the King by his officer there shall seize all his prize there immediately;

2. If a merchant imports 20 tuns of wine, tho' he unlades only nine tuns or four tuns, yet the King shall have his whole prize, viz. two tuns; for if the bulk (as Fleming Ch. J. termed it) be once broken, it is sufficient to the King to take all his prize; adjudged per Cur. And so it appears to be by infinite precedents in the Exchequer. Yelv. 200. Hill. 8 Jac. B. R. Kenicot v. Bogan.

for otherwise the merchant by fraud may constrain the officer to travel from port to port all over England, which shall be inconvenient. Ibid.—2 Bullf. 250. to 254. Trin. 12 Jac. & C.—S. C. cited 3 Bullf. 4. Hill. 12 Jac. B. R. in Case of Waller v. Hanger.—2 Molloy 282. cap. 2. f. 3. cites S. C.—2 Molloy 283. cap. 8. f. 9. cites S. C.

Prize becomes due by the breaking of the bulk, and not before; for before breaking they may depart without paying any prize. Cited by Fleming, Yelverton and others, to have been adjudged in the Exchequer, and affirmed in error. Roll. R. 140. Pasch. 12 Jac. B. R. in Case of the King v. Hanger.—S. P. per Croke J. 3 Bullf. 5. in S. C.—S. P. Calth. 33. &c. in S. C.

3. Prize is not a compleat duty till the wine is arrived at the port, but the duty commences as soon as the wine is shipp'd, and passing upon the sea. Resolved Mo. 833. Pasch. 9 Jac. B. R. in Case of Sir Thomas Waller v. Hanger.

2 Molloy 284. (bis) cap. 8. f. 9. cites S. C.

4. It was held per Cur. that tho' in point of prerogative there is due to the King one tun before the mast, and another behind the mast, yet it is not necessary that the King should take his duty in such form, but he may take which two tuns he pleases; for otherwise this tun before the mast may by the subtilty of the master be transposed to be the third, tenth, or last tun in the ship. Yelv. 200. Hill. 8 Jac. B. R. Kenicot v. Bogan.

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### (R. 5) Prize. Subject to what Charges, &c.

1. KING Charles 1. granted to J. S. and his heirs the duty of prize of all wines imported to hold discharged of all aids and taxes. The question was, whether J. S. should pay *tunnage* for this upon the 9 & 10 W. 3. cap. 23. The duty of *tunnage* was first imposed by 12 Car. 2. cap. 4. viz. 4l. 10s. on all French wine; then comes 1 Jac. 2. cap. 3. and imposes 8l. a tun, with a clause, that grantee of the prize should pay the duty; then comes 7 W. 3. cap. 20. which imposes 25l. a tun; after-

afterwards comes 9 & 10 W. 3. cap. 23. which imposes over and above a duty of 4l. 10s. to be levied as it was by 12 Car. 2. It was adjudg'd in the Exchequer, that the grantee should not pay this duty of tunnage. Upon error brought, it was insisted, that it was an ancient royal revenue, and if the Crown held it, the Queen could not pay tunnage out of her own prisage, and that the grantee ought to have the same privilege, especially because it was granted with this immunity. But it was resolved in the Exchequer Chamber by eight Judges, that immediately upon importation this duty of tunnage attach'd upon the wine, and the grantee receives whatever part he takes for prisage charg'd with the duty. For it cannot be imagin'd, that the law meant to raise this duty on the people to enrich a private man, which would be the effect, if he might have his prisage custom-free; and he paid the tunnage imposed by all former laws. It is true if the prisage had remained in the Crown, it could not have been paid by reason of the unity of possession, it being absurd that it should be chargeable with a duty to itself; but *this exemption is only personal*, and the duty revives when prisage comes to a subject, who may pay it to the Crown; as where a parson leases his glebe. And the clause of discharge could extend only to the tunnage then in being, which he, tho' King, had himself, and not to what he had not, but might be given to his successors. And the judgment was reversed. 2 Salk. 617. Hill. 8 Ann. Paul v. Shaw.

(S) King. *What Things the King may do.*

[1. THE Pope sent to E. 1. to have *annuum censum, in quo Romana ecclesia ratione regni sui Anglia pro octo predictis annis tenetur &c.* To which the King answered by his letter to the Pope, that the parliament was dissolved before that it could be determined, and said, *Quod sine praelatoribus & proceribus communicato consilio sanctitati vestre super predicta non possumus respond. & jurejurando in coronatione nostra prestitum sumus obstricti quod jura regni nostri servabimus illibata, nec aliquod, quod diadema tangat regni ejusdem, absque illorum requisito consilio faciemus.* 3 E. 1. Rot. Claus. Memb. 9. 40 E. 3. Rot. Par. N. 7. The special cause of the summons of the parliament was to have advice what answer should be given to the Pope, who had sent to the King by process to have the annual tribute of 1000 marks by force of a deed, which he said King John made to him in perpetuity to do him homage for the realm of England and Ireland, and to render to him the said annual tribute. To which it was unanimously answered by the Lords and Commons, that King John nor any other can put him nor his realm in such subjection without their assent, and as it appears by several evidences, that if this was done it was done without their assent, and against his oath in his coronation, and that if the Pope attempt to make the

the King do that which he claims, that they would resist, and oppose [him] with all their puissance.]

2. The King cannot record a surrender of land or letters patents made to himself extra curiam, but it ought to be before his Chancellor or some other authorised. Br. Recognizance, pl. 19. cites 2 E. 6. in Colpeper's Case.]

**(T) What Things the King may do [or grant] by Prerogative.**

Fol. 164.

See (E. a).

Note, that customs are good of ancient de-

mesne, borough englift, gavelkind, devise of land by testament &c. and yet the King cannot grant those things by his patent; quod nota, per Littleton in precipe in capite, quod nullus negavit. Br. Prerogative, pl. 103. cites 37 H. 6. 26, 27.

See the note on pl. 1.

[1. THE King can not alter the course of descent. 49 E. 3. 4. 49 Aff. 48.]

See the note on pl. 1.

[3. So the King can not make land deviseable by his charter. 49 E. 3. 4. 49 Aff. 8.]

S. P. For the Pope nor the King cannot change the laws of

[4. So the King can not grant to a man that he shall hold his lands after his entry into religion and profession; because it is contrary to the common law of the land, and the heir [is] inheritable by his entry into religion. 11 H. 76. per Till.]

the land by their bull of dispensation nor grant. Br. Prerogative, pl. 15. cites 11 H. 4. 73.—The common law hath so admeasured the prerogative of the King, as he cannot take or prejudice the inheritance of any. 2 Inst. 36.—S. P. 2 Inst. 63.

[5. 4 E. 1. Rot. Cart. Memb. 3. Part 17. *Ad regie celsitudinis potestatem pertinet & officium, ut partium suarum leges & consuetudines, quas justas & utiles censuerit, ratas habeat, & observari faciat inconcussas; illas autem, quae regni robur diminueret potius quam augere aut conservare videntur, abolere convenit, aut saltem in melius commutare*; at the instance of John of Cobham he ousted gavelkind as to those lands &c.]

The King cannot grant that if a man does a

[6. The King can not grant to any that he shall not be impleaded, and if he makes such grant it will be void. 8 H. 6. 19.]

trespasses to me, that I shall not have action against him. Dav. Rep. 75. a. cites 8 H. 6. 19.—Or that a man shall be his own judge. Dav. Rep. 75. a. cites 8 H. 6. 19.

But the King may privilege his debtor

[7. If a man is indebted to me, and the King grants to him that I shall not have action against him, it is void. 8 H. 6. 19.]

that none shall have execution against him till the King be satisfied. Br. Prerogative, pl. 105. cites F. N. B. fo. 28.

The King by his charter cannot

[8. The King cannot grant to another to hold pleas according to the course of the civil law; for the King can not alter the law.

8 H. 4. in Agar's office, where such grant made to the university of Oxford was held void by all the Justices of England. Cited by Coke.]

*oust the common people of their right of inheritance,*

*which they have in the common law;* per Gascoign. Br. Prescription, pl. 82. cites 8 H. 4. 19.—S. P. *nor change a law.* Br. Prerogative, pl. 18. cites 14 H. 4. 9.— [ 562 ] S. P. Jenk. 97. pl. 88. cites 8 H. 6. 19.—He can neither alter his temporal nor his ecclesiastical laws within this realm by his grant or commission. 12 Rep. 19. in the Case of the HIGH COMMISSIONERS, cites 5 Rep. Cawdrie's Case.—The law and customs of England cannot be changed without an act of parliament; for they are the inheritance of the subject, of which he cannot be deprived without his assent in parliament. 12 Rep. 28. in Case of the Oath ex officio.

[9. The King cannot grant by patent a *Chancery* to another; for the common law is the inheritance of every man, and the King cannot *prejudice any in his inheritance.* M. 5 Ja. B. between *Andrew* and *Webb*, per Curiam.]

The King cannot make a Court of Equity by his charter or commission;

tion; but he may make Courts of common law, and the trial shall be by jury. Jenk. 285. pl. 18. cites Trin. 10 Jac. Archbishop of York's Case.

[10. The King cannot grant *that the council of York shall hold plea by English bill of an obligation or matters triable at common law;* for he cannot alter the law which is the inheritance of every man. M. 10 Ja. between *Guy* and *Sedgewick* and the *Bishop of York*, per Curiam.]

The Crown may grant consueance of pleas to proceed secundum legem terræ; but not to proceed by other laws;

for that would be to make new laws, which the Crown, as being but one branch of the legislative power, cannot do. Admitted per Cur. 10 Mod. 126. Hill. 11 Ann. B. R. University of Cambridge's Case.

[11. 7 E. 1. Rot. Pat. Mem. 13. fo. 10. Commission in quamplurimis comitatibus ad inquirendum, qui dicebant regem *inhibuisse, ne quis blada sua meteret, vel prata sua falcaret;* & quod omnes tales sine dilatione in prisona custodiantur donec authores suos invenerint, & tunc liberent & autores in prisona custodiant donec pro deliberatione eorum mandatum habuerint speciale.]

[12. 28 H. 8. cap. 17. Power given to the successor of the King at his age of 24, to repeal by his letters patents any acts to which he assents before the said age.]

See pl. 19.

[13. Rot. Parl. 15 E. 3. Memb. 2. N. 14. it is prayed, that the election of the great officers of the King, as *Chancellor, Treasurer, &c.* ought to be in parliament.]

Prynne's Cott. Rec. Abr. 32. No. 14.

be chosen in open parliament, and that they be also openly sworn to observe all laws as aforesaid.—The King by his prerogative may make a *sheriff* without the usual election, notwithstanding any statute to the contrary. D. 225. pl. 35. Mich. 5 & 6 Eliz. Anon.

That they

[14. Rot. Parl. 15 E. 3. Memb. 2. N. 14. it is prayed, that divers commissions to inquire of the *Chancellor, Treasurer, and other great officers* be repealed; because such have not been used to be granted without assent of the parliament.]

Prynne's Cott. Rec. Abr. 32. No. 14. That many commis-

sions whereby sundry men have been fin'd by the commissioners outrageously, may be revoked and now granted to others.

[15. If

[15. If a man be *attainted of treason of record*, the King cannot reverse this judgment without legal process, but he may pardon and restore the forfeiture. 29 E. 3. 25.]

[16. The King cannot give to me power to oust another of his land. 29 E. 3. 25.]

Fol. 165.

[17. If my tenants by reason of their tenures ought to collect my rents, the King cannot discharge any of them of this collection; because it is my inheritance. 21 E. 4. 47. by Redmain.]

[18. 15 E. 3. among the statutes at large; the King revoked by his letters patents, with the assent of earls, barons, and other proud men of his realm, certain statutes made before in the said year, because they were against the customs of the realm and his prerogative royal, and assented to them by him by way of dissimulation in case of necessity, and the said statutes have been reputed as repealed ever since; for in another statute in the said year cap. 7. it is said by the Lords and Commons, and that it please the King to perform the grace which he has promised to great men in right to be attached and imprisoned now in this parliament, which refers it to the said statutes so repealed, cap. 2. Vide this Rot. Parl.\* 17 E. 3. n. 23. This is repealed by a special statute, vide the Roll of Parliament, by which it appears that the King never assented fully to it. Quere. Vide Rot. Parl. 15 E. 3. N. 6. 7.]

\* Prynn's  
Cott. Rec.  
Abr. 38.  
No. 23.

[19. 28 H. 8. 17. It was enacted that the Kings of England, after their age of 24, should have power to repeal any statute to be [made] in time of any King before his age of 24. But in 1 E. 6. 11. this is repealed; but power given to make such statutes void from the time of the revocation made, and not ab initio, with this proviso, *Provided* always, and be it enacted, that no King of this realm shall have authority, power, or prerogative to repeal any act of parliament or statute that shall be made in the time of any King before the said age of 24 years, other than such as he or shall be made in his own time, any thing above-mentioned to the contrary in any wise notwithstanding.]

The King cannot delay a suit commenc'd by a subject or against a subject without special cause concerning the publick good. By the Judges of both Benches. Jenk. 133. pl. 71. cites 13 E. 4. 8.

20. The King may discharge or annul a commission of oyer and terminer; but he can not delay, discharge, or stay the proceedings of justice between the subjects by any mandate under the great or privy seal, the commission or patent of the Justices being in force; but he may in his own case. Jenk. 9. pl. 16. cites 12 Aff. 21.

21. The King may grant writ of *warrantia dei* to any person, who shall have his default for one day, be it in plea of land or other action, and be the cause true or not, and this by his prerogative; quod nota. Br. Prerogative, pl. 142. cites F. N. B. fol. 17.

22. The subjects appeal cannot be taken away from him for rape, murder, felony, or robbery, by any pardon granted by the King. Jenk. 307. pl. 83. cites 2 H. 7. 9. D. 59. 93. 323. Stamsf. 102. Hob. 146. 7 Co. Case of Monopolies.

23. The

23. The King, *though* he be *not* party to the record, yet *shall* he take advantage of the *estoppel*; for he is ever present in Court. 2 Inst. 39. In judgment of law the King himself is *always present* to all his

*to minister justice by his Judges* in his Courts of Justice, according to his kingly office, to all his subjects, *secundum legem & consuetudinem Angliæ*. 2 Inst. 549.—S. P. 2 Inst. 55.—S. P. 2 Inst. 31.—The King himself by the great charter is presumed in law to sit in Court. 2 Inst. 269.

24. The words of the statute of 1 R. 2. *cap.* 12. are, *unless it be by writ or other command of the King*; and it was resolved by all the Judges of England, that the King *cannot* arrest a man *by any commandment but by writ*, or by order or rule of *some of his courts* of justice where the cause depends, according to law. 2 Inst. 186.

25. If the *King's goods be wreck'd*, and cast upon ground where a subject has wreck of the sea, who seises the same, the King may make his proofs at any time when he will, and is *not* *confined to a year and a day* as the subject is. 2 Inst. 186. The subject shall not gain property by it against the King. Pl. C.

24.3. b. Trin. 4 Eliz. in Case of Wyllion v. Ld. Barkley.—*So of goods of the King waived, or strays.* Ibid.

26. The King being a body politic, *cannot command but by matter of record*; for Rex præcipit & Lex præcipit are all one; for the King must command by matter of record according to law. 2 Inst. 186.

27. Hufsey Ch. J. reported, that Sir John Markham said to King E. 4. That the *King could not arrest any man for suspicion of treason or felony* as one of his subjects might; because if the King did wrong, the party could not have his action: if the King commands me to arrest a man, and accordingly I do arrest him, he shall have his action of false imprisonment against me, albeit he was in the King's presence. Resolved by the whole Court in 16 H. 6. which authority might be a good warrant for Markham to deliver his said opinion to E. 4. 2 Inst. 186, 187.

[ 564 ]

28. The King for his pleasure *may afforest the woods* of any subject, and he thereby shall be subject to the law of the forest; and he may take the *provision* of any man by his purveyor for his own use, but at reasonable prices, and without abuse. And the King may take *wines* for his provision, and also *timber* for his ships, castles, or houses, in the wood of any man, and this is for public benefit; per Baron Clark. Lane 23. Mich. 4 Jac. in Scacc. in Bates's Case. See Purveyance.

29. A subject may gain a title against a subject by *disseisin* and a descent; but the King *cannot*; for he can *do no wrong*. Jenk. 177. pl. 57. \* S. P. Pl. C. 245. b. —S. P. 2 Inst. 681.—The prero-

gative of the King can *not do a tort* to the subject. Dav. Rep. 75. a. cites 13 E. 3. 8. a. 35 H. 6. 29. b. 5 Coke 55. b. Knight's Case.—S. P. Jenk. 133. pl. 71.—S. P. Jenk. 204. pl. 28.—S. P. Jenk. 313. pl. 96.—S. P. 10 Mod. 5.—S. P. And this maxim takes away the *discontinuance* of the reversion of a subject depending upon an estate tail in the King where the King's grant by his patent of land in tail passes it in fee; for that is a wrong. Jenk. 308. pl. 84.—Every *discontinuance* is a tort, which the King cannot do. Pl. C. 233. a. per Southcott.—The King can *not be a usurper of a church* upon a presentment by lapse where there was no lapse; nor can he be a *disseisor of land*. Resolved by all the Judges. Jenk. 244. in pl. 28.

S. P. 10  
Rep. 33. b.

30. The King only can *make a corporation*. Jenk. 270. pl. 88. in Sutton Hospital's Case cites 49 E. 3. 4. a. 49 Aff. 8. — *And he may make one corporation out of another, and both shall stand.* Jenk. 270. pl. 88. — *And he may give power to a subject to name a corporation; and when it is named, it is the King's corporation.* Jenk. 270. pl. 88.

The King may *erect guildam mercatoriam*, i. e. a fraternity or society, or incorporation of merchants. 8 Rep. 125. a. Hill. 7 Jac. in Case of the City of London. — 2 L. P. R. 144. cites S. C.

31. A *bargain and sale* by the King for any consideration to a corporation is good, altho' the King cannot stand seized to the use of another. Jenk. 270. pl. 88.

32. Regularly the King by his commission may *authorize* whom he pleases to execute an *act of parliament*. 2 Hawk. Pl. Cr. 37. cap. 8. f. 28.

33. It seems that the King himself cannot *fit in judgment upon any indictment*; because he is one of the parties to the suit. 2 Hawk. Pl. Cr. 2. cap. 1. f. 2.

34. It seems to be clearly agreed that the King cannot *give any addition of jurisdiction to an antient Court*. 2 Hawk. Pl. Cr. 2. cap. 1. f. 2.

### (T. 2) Prerogative of the King in general.

1. THE prerogative of the King *shall not prejudice any*. Pl. C. 487. Mich. 17 & 18 Eliz. Nichols v. Nichols.

2. The King may bring his writ of *quare impedit in a foreign county*, if he will. Br. Prerogative, pl. 115. cites 4 E. 3. 9. and Fitzh. Brief 705. — But Brook says *quare* at this day.

3. The King shall not be *amerced*, nor *non-suited*. Br. Prerogative, pl. 100. cites Fitzh. Brief 898. H. 26. E. 3.

4. The writ of the King *shall not abate for false Latin*. Br. Prerogative, pl. 114. cites 28 E. 3. 97. and Fitzh. Brief 429. — But the contrary was adjudged there, pl. 910. 29 E. 3. 41. Ibid.

[ 565 ] 5. The King is *not bound by estoppels*; nor by *\* recoveries had betwixt strangers*; nor by the fundamental jurisdiction of courts, as appears 38 Aff. 20. where a suit was for tithes in the Exchequer, being a mere spiritual thing. Per Hobart Ch. J. Godb. 299. Pasch. 21 Jac. in Sir Edward Coke's Case.

\* S. P. where he has a reversion expectant upon an estate-tail; nor by *abeyance*, nor by *collateral warranty* of his ancestor without assents. He is not bound by *fictions of law*. Jenk. 287. in pl. 21.

S. P. as de-relict land, treasure trove, and the like. 2 Vent. 268. Hill. 2 & 3 W. & M. in Case of Woodward v. Fox. — *So of extraparcial tithes, tho' things of an ecclesiastical nature.* Ibid. — *So it is said elsewhere of land &c.* Br. Prerogative, pl. 12. cites 8 H. 4. 2.

7. Where

7. Where a right appears for the King in a suit, altho' he be not party to the suit, he shall recover the thing. Jenk. 219. pl. 65. cites 11 H. 4. 71. 16 H. 7. 12. 12 H. 7. 12. F. N. B. 38. As in quare impedit between two subjects, if a title for the King appears to the Court, the Court shall ex officio award a writ to the bishop; for the King is interested where right appears for him in the suit of any one. Jenk. 25. in pl. 47.

8. The King shall not pay \* toll, portage, nor passage; nor shall lapse by six months of a benefice bind the King; so of alienation by his vassal before seizure; for † nullum tempus occurrit regi: but contra of custom, which may have lawful commencement, as gavelkind, borough-english, devising land by testament, and the like; but the King's horse shall not be forfeited, as waif or stray; nor ‡ twenty descents shall not toll the King's entry; nor wreck of the sea of his goods, and not claiming within the year shall not prejudice him; nor sale in ‖ market overt; for the King shall not be bound by any custom which goes to the person or to the goods; contra of custom upon the land, as borough-english, gavelkind &c. And yet, per Prisot, if land which ought to pay a fine at the alienation be aliened to the King, he shall not pay fine. Br. Customs, pl. 5. cites 35 H. 6. 25. S. P. Jenk. 83. in pl. 62.—\* S. P. Nor custom. Br. Prerogative, pl. 112. cites 23 H. 3. and Fitzh. Tolle 5.—† Pl. C. 243. a. 263. b. S. P.—‡ It was held clearly by the Court, that

against the Queen a descent is no plea, nor any title against the Queen, because nullum tempus occurrit regi; neither shall laches be imputed to her; for the possessions of the Queen are large, and it is not fit that she should be bound, or ty'd, to look to her affairs concerning her possessions, or to incur any damage in default thereof; for she is to intend and manage the publick affairs of the kingdom and state. 2 Le. 31. pl. 37. 31 Eliz. in the Exchequer, Norris's Case.

No \* laches shall be imputed to the King. Co. Litt. 57. b.—S. P. And therefore there can be no trial by proviso in the King's Case. Resolved per Cur. 6 Mod. 247. Mich. 3 Ann. B. R. in Case of the Queen v. Banks.—S. P. per Fleetwood Serjeant. 2 Le. 110. Trin. 29 Eliz. in Case of Kivet v. Taylor.—S. P. 2 Hawk. Pl. Cr. 408. cap. 41. l. 11.—\* See (Q. 6) pl. 2.—|| S. P. a Inst. 713.—Pl. C. 243. b. S. P.

9. Where an advowson held of the King descends to four parceners, and the one is within age; because the advowson is not parted, the whole advowson shall remain in the hands of the King until the infant be of full age, and then all shall sue livery. Br. Prerogative, pl. 44. cites 38 H. 6. 9. Br. Preferentiation, pl. 35. cites S. C.

10. Founder'ship may come to the King by escheat. Br. Petition, pl. 26. cites 5 E. 4. 118.

11. A. was bound to two in an obligation in 40 l. and the one was felo de se, which was found by office; and per Choke J. it is all forfeited to the King: but Young contra; for the survivor took place before the office. Br. Traverse de office, pl. 36. cites 8 E. 4. 4. So if one of them is outlawed, the King shall have the whole duty; so he shall

have the intire ox or horse of the outlaw held in common. Pl. C. 243. a. Trin. 4 Eliz. Wyllion v. Ld. Barkley.

12. Where an alien has a seignior or manor, and the tenants are amerced, the King shall have it by avowry; quod non negatur. Quere how, without matter of record. Br. Prerogative, pl. 97. cites 11 E. 4. 2. and Fitzh. Avowry, pl. 223. [ 566 ]

13. Where the King leases for years, rendering rent with condition of re-entry for non-payment, the King is not bound to demand S. P. Pl. C. 213. b.—And the.

King is not bound to offer acquittance to any man; but the subject who pays to the King ought to bring with him acquittance, and to demand it of the King. Br. Prerogative, pl. 101. cites 2 H. 7. 8.

But by Sege-  
wicke, the  
King may  
have prero-  
gative of a  
thing newly  
given by statute,  
14. In a thing newly given by statute the King cannot have prerogative. Br. Prerogative, pl. 63. cites 12 H. 7. 19. per Frowike.

thing newly given by statute, \* If the same was at common law before. Ibid. Br. Parliament, pl. 46. cites S. C.—\* The year-book 9. b. mentions the same thing being enlarged by statute.—As if forger of deeds be made felony by statute, there if a man seized of lands be thereof convicted, the King may have annuum, diem & vestium by his prerogative, tho' it be not express'd in the statute. Br. Prerogative, pl. 63.—S. P. For by law it is annexed to the nature of the felony. Br. Parliament, pl. 46. cites S. C.—Contra where a thing is enacted by statute, of which no such like thing was at common law before, as to have the ward of the heir of cesty que use. Br. Prerogative, pl. 63. Br. Parliament, pl. 40. cites S. C.

15. If the King aliens land parcel of his dutchy of Lancaster within age, there he may avoid it by non-age; for he has the dutchy as Duke, and not as King; contra of the land which he has as King; for the King cannot be disabled by non-age, as a common person shall be; quod nota. Br. Prerogative, pl. 132. cites 1 E. 6. and anno 6 and 26 E. 3. accordingly.

16. No man can enter upon the possession of the King for condition broken, but is put to his suit; for the land shall not be plucked from the King without trial or matter of record, any more than it can be vested in him without matter of record. Arg. D. 139. pl. 33. Hill. 3 and 4 P. & M. The Duke of Norfolk's Case.

17. The King can hold of none. D. 154. b. pl. 18. Mich. 4 & 5 P. & M. The King v. Archbishop of Canterbury.

18. The treatise of Prærogativa Regis does not contain all the prerogatives of the King, but part of them. Arg. Pl. C. 322. Mich. 9 & 10 Eliz. Case of Mines.

19. Without seizure no property is changed by waiver &c. unless in case of the King. Per Catlyn Ch. J. D. 338. b. pl. 40. Mich. 16 & 17 Eliz. Anon.

20. Prerogative is no protection against that which is hard and tortious. Per Periam J. Mo. 204. Pasch. 27 Eliz. cites Pl. C. . . . Barkley's Case.

S. C. Cited  
a Vent. 267.  
Hill. 2 & 3  
W. & M.  
C. B. in  
Case of  
Woodward  
& Fox.  
21. Manwood Ch. B. took this diversity, viz. Where it is ordained by statute, that by feoffance, misfeoffance, or non-feoffance, of a thing, the offender shall forfeit such a sum of money, and does not express to whom he shall forfeit it, there the forfeiture shall be intended to the King, unless the penalty be for taking of goods &c. in which the subject has a property, then the subject shall have the forfeiture in recompence of his property lost. Mo. 239. Pasch. 29 Eliz. Anon.

22. Prerogative cannot *alter estates*. Per Fenner. Owen. 90. Mich. 29 & 30 Eliz. in the Bishop of Lincoln's Case.

23. Always when the *title of the King and of the subject concur*, the title of the King shall be preferred. 3 Le. 251. Per Egerton Solicitor.

S. P. 2 L.  
P. R. 144.  
—S. P. *De-  
tur digniori*  
is a rule in

the case of concurrence of titles between the King and subject. 2 Vent. 268. Hill. 2 & 3 W. & M. C. B. in Case of Woodward v. Fox, cites 9 Rep. 24.—*As the King-lord, mesne and tenant; the tenant pays his rent at the day before noon, and then the same day before night the mesne dies, his heir within age, the King shall be paid the rent again; for here the title of the King [ 567 ] and the subject concur together \* at one time, and in that the King shall be prefer'd.* 3 Le. 251. Per Egerton Solicitor, cites 43 E. 3.—\* S. P. Pl. C. 259. 2. But where the title of the subject is *elder* than that of the King's, he shall avoid the title of the King.

24. All pretence of prerogative *against magna charta* is taken away. 2 Inst. 36.

25. In the King's Case *all the coparceners shall do suit*, as well after partition as before, and so shall their several feoffees; for the statute of Marlebridge, cap. 9. does not extend to the King. 2 Inst. 119.

26. A *nisi prius* shall not be granted where the King is party, or where the matter toucheth the right of the King, *without a special warrant* from the King, or the assent of the King's attorney, 2 Inst. 424.

S. P. 2  
Hawk. Pl.  
C. 411.  
cap. 42. f. 2.

27. Every prerogative is as *ancient* as the Crown, and no prescription lies in it; per Clerk J. Arg. Lane 26. Mich. 4 Jac. And per Flemming Ch. B. accordingly. Ibidem.

28. Every thing for the *benefit* of the King shall be taken *largely*, as every thing against the King shall be taken *strictly*; per Hobart Ch. J. Godb. 295. Pasch. 21 Jac. in Sir Edward Coke's Case.

29. Any subject may have an *appeal* against the person who steals the Kings or Queens goods. Jenk. 25. pl. 47.

S. P. Jb.  
83. pl. nk.  
—S. 62.  
Jenk. 3 P.  
pl. 77.

30. The Judges *ex officio*, and every one else in his station ought to assist the King in his rights, and the Judges are bound *ex officio* to take notice of every statute which concerns the King. Jenk. 303. pl. 67.

31. Upon an *information* for the King he may have a *distringas* with a *tales* before there be any default of the appearance of a jury upon the venire facias, and if any person returned in the venire facias be omitted or misnamed in the distringas with the tales, it shall be amended. Jenk. 87. pl. 70.

32. The King cannot be sued, nor can a \* *distress* be taken upon land in his possession. Jenk. 112. pl. 18.

\* S. P. 2  
Hawk. Pl.  
C. 60. cap.  
12. f. 26.—

None may distrain for feignory or rears in the land of the King, which he takes in the capacity of his body natural, nor have execution of them. Pl. C. 242. b.

33. It is clear that the King cannot be *devested* of any of his prerogatives by general words in an act of parliament, but that there must be plain and express words for that purpose, tho' all his

other rights are no more favour'd in law than the rights of his subjects. 8 Mod. 8. Mich. 7 Geo. in Case of the King v. the Archbishop of Armagh.

(U) *What Thing may be done without Licence of the King.*

[1. R O T. Pat. 12 E. 1. M. 15. Letter to Dean and Chapter Sancti Pauli London, *quod cimiterium includere possint muro lapideo.*]

2. Before the statute 18 E. 3. no subject might *pass over the sea* without special licence of the King. But there it is enacted, that the sea shall be open to all merchants. Dav. Rep. 56. b. Mich. 8 Jac. in the Case of the Royal Fishery of the Banne.

[ 568 ] 3. Before 31 Eliz. which was the next year after the Spanish Invasion, there was not any licence or commission of any King or Queen of this realm for the *taking of salt-peter*; but in the said 31 year there were *two licences* granted, the one particular to George Constable Esq; and the other general to George Evelin, Richard Hills, and John Evelin. The *first* gave Constable power and authority for 11 years to *dig, open, and work for salt-peter within the counties of York, Nottingham, Lancaster, Northumberland, Cumberland, and the bishoprick of Durham*, as well within the lands, grounds, and possessions of the Queen, as within the lands, grounds and possessions of the subjects within the counties aforesaid, and the consideration of the patent was for a great quantity of salt-peter yearly by the said George Constable, to be made and provided for the store of the Queen at a lower rate than before was paid. 12 Rep. 14. in the Case of Salt-Peter.

4. *The other* commission to Evelin &c. *extends to all* the realm of England and Ireland, and all other *dominions of the King*, as well within the lands, grounds, and possessions of the Queen, as within the lands, grounds, and possessions of any of the subjects. 12 Rep. 14. in the Case of Salt-Peter.

5. *And after*, viz. 18 October 2 Jac. commission was granted to Evelin and others to take salt-peter in the lands, possessions, and other convenient places, and in convenient times; so that there were but three licences or commissions ever made, and in none of them any power by express words is given to *dig in any mansion-house* &c. And in none of them is any prohibition to the subject to dig in his own land. 12 Rep. 14. in the Case of Salt-Peter.

(X) \* Impositions.

[1. 1 E. 3. cap. 5. THE King wills that *no man be charged to arm himself* otherwise than he was wont in the time of his progenitors *Kings of England*. And that no man be compelled to *go out of his shire*, but where necessity requireth, and sudden coming of strange enemies into the realm, and then it shall be done as hath been used in times past for the defence of the realme.]

\* Imposition is properly a thing which is exacted of the people, of which they shall have no benefit, so that a discharge of impositions

exempts not from finding armor which continues in their own custody. Savil. 52. — § Bacon, Of Government, 2d Part 102, 103. takes notice of this statute, and says that the words thereof are variously set forth in the books in print, and says, that the words in English are verbatim thus, viz. And that none be distrained to go out of the counties, if not for necessity of sudden coming of strange enemies into or in the kingdom; whence he infers, that probably the invasion must be actual before they are drawn out of their counties, and not fear'd only; and it must be a sudden invasion, and not of publick note and common fame foregoing.

[2. 11 H. 7. cap. 1. The King calling to remembrance the duty of allegiance of his *subjects* of this his realm, and that they by reason of the same are *bound to serve their Prince* and Sovereign Lord for the time being, in his wars for the defence of him and the land against every rebellion, power and might reared against him, and with him to enter and abide in service, i. e. in battell, if case so require &c.]

This statute has been the subject of great controversy.

3. 11 H. 7. cap. 18. Every subject, by the duty of his allegiance, is bound to serve and assist his Prince and Sovereign Lord, at all seasons when need shall require.]

[4. 31 E. 1. Rot. Fin. Memb. 2. Inquisition of those that were pressed to go into Scotland, and did not go &c.]

[5. 2 H. 4. 24. recites, That whereas [by the] 23 R. 2. it was commanded throughout the realm, and to certain people of the realm charged upon their allegiance to \* come to the Duke of York, then being Lieutenant of England, to go and tarry with him at the wages of the King &c.]

\* Fol. 166.

[6. 5 H. 4. N. 24. A commission agreed by parliament to be sent into every county, thereby giving power to commissioners to impose arms upon those who are able to find them at their own costs, and to serve in person, and for those who are able in estate and not in person to find others for them, to the intent that for the defence of the realm they may stay in their country at their own costs &c. as the commissioners shall shew them, and shall find for the defence of the country as need shall be, and prepare beacons &c.]

[ 569 ]  
Prynne's  
Cott. Rec.  
Abr. 428.  
No. 24.  
The Com-  
mons do  
amend the  
commission  
for the ar-  
raying or  
muster-  
ing of men or

watching of the beacons, and pray the King, that from thenceforth there should no other forms thereof be made. Whereunto the King with the assent of the Lords, after consultation therein had with the Judges of the realm, consented.

[7. Quere, Whether the subjects of England are bound by their allegiance to go with the King, or upon his command, to

By the law  
of the land  
no man can  
war

*be exil'd or banish'd out of his native country, but* war in a foreign dominion, which is not any part of the dominions of the King, to subdue it. It seems \* Yes.]

8. 25 E. 1. † In the monastery of Gisburne the King would have the constable and marshall of England, and other lieges, to go into Flanders, who refused it, because (as they said) they were not bound to go out of the dominions of the King, and upon this they levied war against the King.]

by the common law. And therefore the King cannot send any subject of England against his will to serve him out of the realm; for that should be an exile, and he should perdere patriam; no, he can not be sent against his will into Ireland, to serve the King as his deputy there, because it is out of the realm of England; for if the King might send him out of the realm to any place, then under pretence of service as ambassador, or the like, he might send him into the farthest part of the world, which being an exile is prohibited by the act 9 H. 3. cap. 47. 2 Loft. 47, 48.—\* Orig. (Que.)

† Orig. (en l'Amoigne de Gisburne) but what the words (l'Amoigne) signify can only be guess'd at; that there was such a religious house, appears in Brompt. Chron. among the Decem Scriptores 1209. l. 33, 34. And that it lay in Cleveland, and was founded by Robert de Breus in the time of H. 1. appears ibid, 1018.

[9. 34 E. 1. 5. There is a pardon of the constable, marshall, and others, and all others being of their fellowship, confederacy and bond, and also to all others that hold 20 l. land in our realm, whether they hold of us in chief or of other (that were appointed at a day certain to pass over with us into Flanders,) [of] the rancour and evil will born against us, and all other offences that they have done against us unto the making of this present charter.]

The opinion of Thirning here is to be understood thus, that an English subject is not compellable to

[10. 7 H. 4. Br. Tenures, 44. 73. By Thirning, a man is not bound to go with the King to war extra regnam, but for wages; but men are bound by their allegiance to go at the King's command within the realm, and in defence of the realm by their tenures.]

[11. 7 H. 4. Protect. 100. By Thirning, the King cannot compel a man to go out of the realm.]

to go out of the realm without wages, according to the statutes 1 E. 3. c. 7. 18 E. 3. c. 8. 18 H. 6. c. 19 &c. 7 H. 6. c. 1. 3 H. 6. c. 5. &c. in anno 25 E. 1. Bigot Earl of N. and S. and Earl Marshal of England, and Bohun Earl of H. and High Constable of England, did exhibit a petition to the King in French (which Id. Coke says, he has seen anciently recorded), on the behalf of the Commons of England, concerning how, and in what fort they are to be employ'd in his Majesty's wars out of the realm of England, and the record saith, that post multas & varias alterationes, it was resolved, that they ought to go, but in such manner and form as after was declared by the said statutes, which seem to be but declarative of the common law. And (after citing many cases) it was concluded, that the liegeance of a natural born subject was not local and confin'd only to England. 7 Rep. 7. b. 8. a. Trin. 6 Jac. in Calvin's Case.

12. Where imposts or impositions are generally named in diverse acts of parliament, the same are to be intended of lawful impositions, as of tonnage and poundage, or other subsidies imposed by parliament, but none of those acts or any other do give the King power at his pleasure to impose. 2 Inst. 64.

(Y) Money.

Sec (K. a).

[1. **M**irror of Justices, fol. 3. b. It was ordained, that no King of this realm might *change his money, nor impair, nor amend, nor make other money than of silver*, \* without the assent of all the counties.—Rot. Parl. 17 E. 3. N. 15, 16. ordains, that the money be ‡ *of the alloy of the ancient sterling*, and that it shall not be || *transported out of the realm.*]

S. P. 2 Inst. 576.—No subject can be inforced to take in buying or selling or other payment any

money made, but only of lawful metal, that is of silver and gold, as the Mirror hath told you. 2 Inst. 577.—\* 2 Inst. 576. cites Mirror, cap. 1. f. 3. and says, that the words (sans l'assent de tous les counties) signify without assent of parliament.—† Prynn's Cotton's Records Abr. 37, No. 15. cites the same Roll, that silver be coin'd according to the old sterling in poise and alloy, to be current among the subjects, and not to be carried over upon pain of death. And if the Fleming should coin their silver accordingly, that the same be current among merchants.—|| *Transportation* of money is an offence against the state, policy, and safety of the kingdom, and so punishable by the common law. Hob. 270. Courteen's Case.—Ibid. 293. cites stat. 5 R. 2.

[2. Rot. Parl. 20 E. 3. 17. The Commons pray, that the receivers of payments of our lord the King, receive of the people in every place as well gold as silver at the price assessed, \* as of the part of the people it is articulated herein to receive for payment the change of money of gold, nor of silver, nor this do without assent of parliament. Answer, as to the first point of this article, be it held; as to the making exchanges, be the article shewn to our lord the King, and ‡ as grants que sont per deniers luy which they have ordained and consented to.]

Prynn's Cott. Rec. Abr. 48. No. 17. That the King's receivers may receive as well gold as silver, and that the changers thereof be

not without parliament. The answer was, that the first is granted, the second respited.—\* Orig. (desicome le peuple est article de cel receiver pur payment la change de money d'or as d'argent ne ceo face)—† Quære how to translate this.

[3. Rot. Parl. 25 E. 3. 2 Part, N. 38. The Commons pray, that *exchange of money shall not be limited to any place in London*, but where every one lists. The King assents to this.]

Prynn's Cott. Rec. Abr. 80. No. 38. says, The

print touching the exchange of gold and silver agreeth with the record.

4. It appertains to the King only to put a value to the coin, and to make a price of the quantity, and to put a print to it, the which being done the coin is current for so much as the King has limited. Arg. Pl. C. 316. in the Case of Mines.

2 Inst. 576. cites S. C. and P.—Dav. Rep. 19. a. cites S. C.—

It was resolved, that as the King by his prerogative may make money of what matter and form he pleases, and establish the standard thereof, so may he change the money in substance and impression, and inbase or abase the value thereof, or utterly decry and annul it, so as to be only bullion, at his pleasure. Et nota, that bullion est moneta defensa & prohibita quæ, videlicet, usu caret. Dav. 20. b. in the Case of Mixt Monies.

5. It was resolved, that it belongs solely to the King of England to make or coin money within his dominions, so that no other person can do it without special licence or command of the King; and if any presumes to do it of his own head, this is treason against the person of the King by the common law; and

and this appears by the statute 25 E. 3. cap. 2. which is only a declaration of the common law; and by Glanvil, Britton, and Bracton, before this statute. Dav. Rep. 19. a. Trin. 2 Jac. in the Case of Mixed Monies.

6. As wax is not a seal without a print, so metal is *not money without an impression*. Dav. Rep. 19. b. in Case of Mixed Monies.

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Every piece of money ought to have its de-

nomination or *valuation*, for which it shall be accepted or paid, as for a penny, a groat, or a shilling; and all this ought to be done by authority and command of the Prince, and *ought to be publish'd by proclamation* of the Prince; for before this the money is not current. Dav. Rep. 19. b. in the Case of Mixed Monies.—The King by his *proclamation may make any coin lawful money of England*: a fortiori he may, by his proclamation only, establish the standard of monies coin'd by his authority within his proper dominions. Dav. Rep. 19. b. in the Case of Mixt Monies.—Cites 5 Rep. 114. b.

8. 15 & 16 Geo. 2. makes it high-treason to counterfeit the coin by *washing, gilding, or colouring any lawful or counterfeit shilling or six-pence, with intent to make it resemble or pass for a guinea or half-guinea; or to file or any ways alter, wash, or colour any halfpenny or farthing with intent to make it resemble or pass for a shilling or a six-pence.*

And any person uttering false money knowingly, shall suffer six months imprisonment, and find security for two years more; for the second offence two years imprisonment, and security for two years more; and for the third offence shall be adjudged guilty of felony without benefit of clergy.

And if such person shall either the same day or within ten days next after utter any more such money knowingly, or shall, at the time of uttering, have in his or her custody one or more piece or pieces of counterfeit money besides what was so uttered, then such person shall be deemed a common utterer, and being convicted shall suffer one year's imprisonment, and find security for two years; and being a second time convicted of such offence, shall be adjudged guilty of felony without benefit of clergy.

Blood not to be corrupted though persons suffer for treason or felony.

Evidence to be the same as now used against counterfeiting the lawful coin.

And any coining or counterfeiting any brass or copper money, and their abettors and procurers, being convicted, shall suffer two years imprisonment, and find security for two years.

Persons apprehending such as have committed treason or felony by this act, or who have made or counterfeited any such copper money, and convicting them, shall receive of the sheriff for every such offender convicted of treason or felony 40 l. and for every such offender convicted of counterfeiting the copper money 10 l. within one month after conviction and demand thereof made, tendering a certificate to the Sheriff &c. from the Judge or Justices.

Sheriff refusing to pay the reward according to the certificate, shall forfeit to such prosecutor and prosecutors severally double the sum directed

debt by the said certificate to be severally paid to them, to be recovered in any of his Majesty's Courts at Westminster, by action of debt, bill, or information, with treble costs of suit. Sheriff to be allowed such payment for rewards in his accounts.

If offenders being out of prison shall impeach two others, they shall be pardoned.

And if an person convicted of uttering any false or counterfeit money, shall afterwards be guilty of the like offence in any other county &c. the clerk of assize, or clerk of the peace for the county &c. where such first conviction was had, shall at the request of the prosecutor, or any other on his Majesty's behalf, certify the same by a transcript in few words, containing the effect and tenor of such conviction, for which two shillings and six-pence only shall be paid, and such certificate produced in Court shall be sufficient proof of such former conviction.

(Z) In what Courts he may sue.

[ 572 ]

[1. THE King may have a *quare incumbravit* in B. R. tho' it be a common plea. 17 E. 3. 50. b.]

Fol. 167.

[2. The King may have a *quare impedit* in B. R. tho' it be a common plea. 17 E. 3. 50. b.]

\* The King may have this and any other action

in B. R. or in what Court he will; per Fitzherbert. Br. Prerogative, pl. 127. cites F. N. B. fol. 32.

3. In *quare impedit* by the King, the defendant made title and travers'd the title of the King, and it was said, that the King might take his suit in the Exchequer, or in what Court he pleas'd. Br. Prerogative, pl. 78. cites 4 E. 3. 11.

All that touches the King and is in his advantage lies in consueance

of the Court, and the right of tythes was try'd in the Exchequer per patriam for this cause. cited by Doderidge J. 2 Roll. R. 295. in Sir Edward Coke's Case. — 44 E. 3. 43.

4. The King has a prerogative of suing in what Court he pleases. Resolved 9 Rep. 74. b. 75. a. Pasch. 13 Jac. in Magdalen College's Case.

S. P. Jenk. 14. pl. 24. — S. P. 2 Hawk. Pl.

C. 287. cap. 27. f. 27.

(A. a) Honours. Serjeants. [Punishment of Refusal to be Serjeants at Law, pl. 1, 2. Knights, pl. 3, &c.]

[1. Diverse apprentices were called by the King, by the advice of his counsel, to be serjeants at law, and they refused it, upon which they were commanded in parliament by the King to hasten to take this estate, and they pray'd respite till Trinity Term, and promised then to take it, the which is granted to them;

Prynne's Cott. Rec. Abr. 553. No. 10. cites same Roll. that Martin Babington,

Poole, Westbury, Fame and Ralfe apprentices at law, and serjeants appointed, had refused the same; where, upon the charge of the warden of England, they took the same upon them.—S. C. cited Dugd. Orig. Jurid. 110, 111. who say, that they declining to take upon them that degree and state, being called by writ in 3 H. 5. Membran. 20. were complained against in the parliament of 5 H. 5. whereupon they were compelled thereto. And says, that the first writ of summons to the degree of Serjeant which he had met with, was in 6 R. 2. unto John Cary, Edmond Clay, and John Hill; tho' Serjeants were before that time, they being taken notice of in the statute of Westm. 1. in 3 E. 1.—As to the ancient form and order in making them, see Ibid. 111. cap. 42.—And as to the after manner in H. 7th's time, Ibid. 113. cap. 43.—And how afterwards, see the next following chapters.

[2. If they do not come at the first day of the return, they shall not be received to have the order after, but shall be fined for the contempt. 7 H. 6. 15.]

\* Orig. is (proclamation) without the word (fiat).—By 16 & 17 Car. 1. cap. 20. none shall be bereafter compelled by writ or otherwise,

[ 573 ] to take upon him the order of knight-hood, and all proceedings concerning the same shall be void.—And 12 Car. 2. cap. 24. s. 1. enacts that all tenures by knight's service of the King or of any other person, and by knight's service in capite and by socage in capite, and the fruits and consequences thereof, shall or may hereafter happen or arise thereupon, or

[3. Rex &c. Salutem. Cum 18 die Feb. anno regni nostri vicesimo tibi preceperimus quod in pleno com. tuo proximo publice proclamatio [fiat] & omnibus illis de balliva tua quorum interesset scire faceres ex parte nostra quod illi de com. predict. qui haberent 40 l. terre in feodo heredit. & qui terram illam & tenementum per triennium ante diem pred. & amplius tenuissent & milites esse debuissent & non erant arma milit. reciperent ante festum Natalis Domini proximi jam preteritum licet quidam de balliva tua arma militaria juxta formam mandati nostri predict. recepisse debuissent & tamen, ut accepimus, nondum receperunt in ejusdem mandati nostri contemptum manifestum per quod nos inde certiorari volumus, tibi precipimus quod inquisitum [sit] inde per sacrum. tam milit. quam alior. probor. & legallium hominum de comitat. predict. per quos rei veritas &c. Dat. 2 Jan, 21 E. 1.]

[4. And after the sheriff return'd an inquisition indented of those who have 40 l. per annum, and then deducted the charges issuing out of it; and some sheriffs returned those who have some land in his bayliwick, and [were] received to make it 40 l. per annum in other counties. But diverse returned how much they have in his bayliwick, and that they are ignorant of the value of that in the other county. And the sheriff of Oxon and Berks returned, that the value of their land cannot be known in his county; but they returned their names, who are supposed to have 40 l. in Oxon and other counties, viz. in Scacario in Baga.]

[5. 3 E. 1. Claus. Memb. 5. A man was amerced to 20 l. quia nondum miles.]

[6. The King may compel every man who has land of inheritance to the value of 40 l. per annum to be a knight, or otherwise to be subject to a fine. 7 H. 6. 14. b. 1 E. 2. Stat.]

[7. H. 3. came into the Exchequer and caused the sheriffs of the counties to be amerced; because they had not distrained all those that had such estates as the law limits to be knights or to pay their fines. Speed. 533.]

[8. 6 E. 1. Rot. Claus. Memb. 8. The King sent to the sheriff,

sheriff, *Quod omnes qui habent 20 l. terræ vel feodum unius militis integrum valens viginti libras per annum, & de nobis tenent in capite & milites esse debent & non sunt, sine dilatione distringas ad arma militaria citra such a day a nobis suscipiendum, & alio quod sum-moneat all such &c. de quocunque tenuerint, and there Memb. 6. quia certis de causis rex non voluit \* quod W. H. distringat. ad arma militaria suscipiendum, mandatum est the sheriff quod non &c. distringat.* 7 E. 1. Rot. Pat. Memb. 21.]

thereby, be taken away or discharged, any law, statute, cus-

\* Fol. 168.

tom or usage to the contrary thereof in any wise notwithstanding;

and all tenures of any bonours, manors, lands, tene-ments, bene-dictaments, or any estate

of inheri-tance at the common law held either of the King, or of any other person or persons,

bodies po-litick or corporate, are hereby enacted to be turned into free and common socage, to all intents and purposes.

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S. 2. And that the same shall forever hereafter stand, and be dis-charged of all tenure by homage, escuage, voyages royal, and charges for the same &c. and all other charges in-cident to tenure by

[9. 8 E. 1. Rot. Claus. Memb. 1. *Pro fine 20 Mar.* given by W. the King gave him *respectum de se milite faciendo* from such a time to such a time, and after he is amerced by the Justices itinerants, because he does not shew them his charter.]

[10. 13 E. 1. Rot. Clauso Memb. 9. Cum de consuetudine regni &c. qui habent 20 libratas terræ vel feodum milit. valens 20 libratas per annum distringerentur *ad arma militaria suscipiend.* nos, ob servitium &c. in Wallia a communitate regni nostri, volumus quod non habentes tum libratas terræ hac vice non distringantur.]

[11. 20 E. 1. Rot. Claus. Memb. 8. dorso. Preceptum est singulis vice-com. per Angliam & Justic. Cestrie quod proclama-mari faceret, *quod omnes qui habent 40 libratas terræ in feodo & hereditate fumerent militaria arma.* 21 E. 1. Rot. Fin. Memb. 25. accordingly, and commanded to seise the lands of those that would not take the degree. 20 E. 1. lib. Parl. 34.]

[12. 6 E. 1. Rot. Pat. Memb. 5. Rex omnibus &c. *Quia accepimus per inquisitionem &c. quod Johannes de G. non habet 20 libratas terræ nec feodum militis integrum valens 20 l. per annum.* Concessimus eidem Johanni quod de cetero non distringatur ad arma militaria, contra voluntatem suam &c.]

[13. There are several special grants to diverse men that they shall not be compelled to be knights for a time, and some during their lives. 21 E. 1. Pat. Memb. 5 & 17.]

[14. If a man holds land in burgage to the value of 20 l. per ann. yet he is not compellable to be a knight. 1 E. 2. Stat.]

15. None by reason of any land, which he holds in manors, which are now in ancient demesne of the Crown, as a sokeman, and which land ought to give tallage when the demesnes of the King are tailed, shall be distrained to be a knight. 1 E. 2. cap. 1.]

[16. He that holds land in socage of other manors than of the manors of the King doing no foreign service, yet he is compellable to be a knight. Vide the Writ of Summons to be made knights, always is, *Quod omnes qui habent 20 l. terræ vel feodum milit. integrum valent. 20 l. per annum &c.* So the first 20 l. before-mentioned, as it seems, cannot have other intendment but of socage land. Vide Stat. of 1 E. 2. cap. 1. *De Militibus*, where it is said that the rolls of the Chancery shall be searched, and that it shall be done as it had used to be before.]

knight service; and of and from aid to marry his daughter, and aid to make his son a knight. B. 4. And that all tenures to be created by the King, his heirs or successors upon any grants &c.

of any manors &c. of any estate of inheritance at the common law, shall be in free and common socage, and shall be so adjudged, and not by knights service or in capite.

S. 11. Provided that nothing therein contained shall infringe or hurt any title of honour, freedom or other, by which any person hath or may have right to sit in the Lord's House of Parliament, as in his or their title of honour, or sitting in Parliament, and the privilege belonging to them as Peers.

## (B. a) In the Sea.

At this day, by the laws of England, the King may interdict any nation or people whatsoever to pass thro' his seas, without leave first obtained to that purpose; and may visit all ships, be they of war or traffick, that shall occur or be in the same. 2 Molloy 375. cap. 16. l. 2.

[1. Rot. Parl. 8. THE Commons pray, that whereas the King H. 5. N. 6. and his progenitors always have been lords of the sea, and now it happened that the King is lord of the coasts of both sides of the sea, and therefore pray the King to lay an imposition upon strangers passing over the sea.]

[2. If the sea overflows my land for 40 years, and afterwards refloes again, I shall have my land, and not the King. M. 7. Ja. B. per Coke and Foster.]

\* i. e. Waste or uncultivated land. See Spelm. Gloss.

† Pol. 169.

‡ This word should be costera, and signifies coast or shore. See Somn. Gloss. & Spelm. Gloss.

§ This word should be fabulonem, and signifies sea-sand.

[3. M. 23 E. 3: B. R. Rot. 26. Abbas Sancti Petri de burgo implacitatur per presentationem factam per divers. hundred. & wapent. quod perquisivit 300 acres \* warecti in Gofberlick in com. Lincolne licentia regis non obtenta &c. that they dicunt quod consuetudo patrie est & fuit a tempore quo &c. quod omnes & singuli domini maneria terras seu † tenem. super ‡ cafteram maris habentes particulariter habebunt warectum & § fablonem per fluxus & refluxus maris secundum magis & minus prope tenem. sua pro-jecta & sic dic. quod habet quoddam manerium in predicta villa unde plures terræ ejusdem adjacent costere maris & sic habet per fluxus & refluxus maris circit. . . . acras warecti terris suis adjacentes & per temporis incrementum secundum patriæ consuetudinem & absque hoc quod perquisivit &c. Ideo. ven-jur. &c.]

This does not belong to this head, but to (K. a)

[4. The King may dig the soil of another man, scilicet, in the out-houses, but not in the dwelling-houses. M. 10 Ja. B. per Curiam. Sir Robert Johnson's Case.]

And the soil of all rivers, as far as

[ 575. ] there is

fluxum & refluxum maris, is in the King, and not in the lords of manors &c. without prescription. Sid. 149. Trin. 15 Car. 2. B. R. in Case of Bulstrode v. Hall.

[5. Every water which flows and refloes is called arm of the sea so far as it flows. 22 Aff. 93. Da. Piscar. Ban. 56. such river participates of the nature of the sea, and is said arm of the sea so far as it flows.]

[6. If the arm of the sea runs between two seigniories, and the soil of the one seigniory is taken away by the arm of the sea, and the soil of the other seigniory increased, whether the other lord shall lose his soil? 22 Aff. 93. Quere.]

[7. 8 E. 2. Itin. Canc. Corone 399. Nota by Stanton, that it is not \* the sea where a man can see that which is done of each side of the water, as to see from the one land to the other, that the coroner shall come in this case, and shall do his office; † as where an adventure happens in an arm of the sea, there another man may see from the one part to the other, of the adventure that in this place happens the country may have consufance.]

\* Orig. is (passance de mere.)  
† Orig. is (auxy come aventure avient.)

[8. In the statute of 7 Jac. cap. 18. it is recited, that where diverse in Devon and Cornwall, having lands adjoining to the sea-coasts there, have of late interrupted the bargemen, and such others as have used their free will and pleasures to fetch the sea-sand, and to take the same under the full sea-mark, as they have heretofore used to do, unless they make composition with them at such rates as they themselves set down, tho' they have very small or no damage thereby, to the great decay of husbandry &c. and therefore enacts, that it shall be lawful to take and fetch sea-sand at all places under the full sea-mark, where the same is, or shall be, cast by the sea, and it shall be lawful to cast on land one of their sea-barges in such places as it hath been used to be landed within 50 years last past.]

[9. 45 E. 3. In Register Ramsey cited D. 15. 16. El. 326. 2. Norff. de quodam proces. de scaccario fact. versus abbatem de Ramsey ad ostend. quare 60 acres marisci in manus regis non debent seisciri quas abbas appropriavit sibi & domui suæ sine licentia regis super quadam present. virtute cujusdam general. commissi. de terra a rege concelat. & detent. Abbas respond. quod ipse tenuit manerium de Branchest quod scituatum est juxta mare & quod est ibidem quidam mariscus qui aliquando per influxum maris minorat. & aliquando per defluxum maris auget. absque hoc quod appropriatum sibi &c. prout per present. predict. supponitur. And the attorney of the King maintains the presentment, and thereupon issue was joined, and a verdict for the abbot at Nisi Prius &c. 45 E. 3. and upon this judgment given, that eat inde sine die salvo &c.]

The Prince shall have all lands left by or gained from the sea. D. 326. b. pl. 2. marg. says, he had seen and perused a treatise of it, and that there are several examples of Romney-marsh and Broomhill in Kent, of

which they are farmers to the King; and there is vouch'd a memorandum accordingly. Trin. 43 E. 3. Rot. 13. ex parte Rememb. Thesaur.—If the sea-marks are gone, so that it cannot be known, in such case the land gained from the sea belongs to the King; but if the sea covers the land at the flux of the sea, and retreats at the reflux, so that the sea-marks are known, if such land be gained from the sea, it belongs to the owner. D. 326. b. pl. 2. marg. cites 8 Eliz. Corporation of Rumney's Case.

[10. P. 17 El. in Scacc. Diggs informer for the Queen against Hammond, for Marsh circa Sandwich, in like manner as this before cited of 45 E. 3. and a verdict given for Hammond against the Queen, which see cited D. 15, 16 El. 326. 2.]

[11. If the salt water of the sea leaves a great quantity of land upon the shore, the King shall have this land by his prerogative, and the owner of \* the land next adjoining shall not have it as a perquisite. D. 15. 16 El. 326. 2. Davis Piscar. de Bann. 56.]

\* Fol. 170.

If the sea leaves the land greatly, and

detain, and for but a little quantity, the owner of the soil shall have it; but if in a great quantity, and

and at a time, it goes to the King. 2 Vent. 188. 2 W. & M. C. B. in *Cafe of Woodward v. Fox*, cites Dav. 5. 6. [but it should be 56] and Sid. 86. and Dyer 126. [but it should be 326. b. pl. 2.]

\* [12. The *soil* upon which the sea flows and reflows, scilicet, *between high-water mark and the low-water mark, may be parcel of a manor of a subject.* 5 Rep. *Sir Henry Constable's Cafe* 107. per Curiam; and there said that so it was adjudged in *Lafce's Cafe*. Tr. 25 El. B. R. P. 16 Car. in Ca. Scacc. in the *Cafe* between the Attorney of the King and *Sir Samuel Rolle, Sir Richard Buller, and Thomas Arundell*. Resolved and adjudged by decree of all the Barons upon hearing of the cause by English bill.]

[13. D. 16 El. 325. 2. De alluvione accrescent. & *inundatione maris seu fluminis subito & extraordin. per vehementes tempestates, & quando per naturales & ordinarios fluxus maximos, viz. spring-tides, qui fiunt bis quodlibet mense differentia magna est by gaining of land, surrounding or overflowing of banks when the metes and certain limits by trees and bounds are utterly defaced by the sea.*]

The reason why the King has interest in such navigable river as high as the sea flows and reflows in it, is, because such river participates of the nature of the sea, and is said a branch of the sea as high as it flows. Dav. 56. a. S. C.

[14. Da. Rep. *Royall Piscarie of the Banne*. 56. Every navigable river, so high as the sea flows and reflows therein, is *flumen regale*, and the fishery of it is also *royal fishery*, and belongs to the King by his prerogative. But in every other river *not navigable*, and in the fishery of such river *the terretenants of either side* thereof have interest of common right. And ibidem the King's Bench has the same interest in the arms of the sea and navigable rivers so high as the sea flows and reflows in them, as it has in alto mari, appears by several authorities and records.]

The King shall have the great fishes of the sea, as whales, sturgeons &c. which are plices regales, and no subject can have them without special grant of the King. Dav. 56. a. in *Cafe of the Royal Fishery of the Banne*. Cites *Prerog. Regis*, cap. 11. *Stauford* 37. 38. *Bracton*, lib. 3. cap. 3. § 1. E. 3. 35. a.

[15. And ibidem 97. Resolved that the river of the Banne, so far as the sea flows and reflows therein, is *flumen regale*; and the piscary of falmons there, a *royal piscary*, which belongs to the King as a *several piscary*, and not to those who have the soile *ex utraque parte* to which; but of the other part it was agreed that *every inland river, not navigable, belongs to the owners of the soile where it has it's course.*]

[16. Rot. Pat. 23 E. 1. Licence given *hominibus Holland, Zealand & Frizland quod piscari possint in mari nostro prope Jernemuth & commodum suum inde facere*; et mandatum *Johanni B. custodi maritime sue Jernemuth & ballivis Jernemuth quod semel vel bis in qualibet septimana proclamari faciant ne quis eos molestiam inferrent &c.*]

*Prynne's Cott. Rec. Abr.* 547. No. 33.

[17. Rot. Parl. 3 H. 5. 1 Part, N. 33. The Commons pray that where the lieges of England have *fished* in diverse places for fish, and for 6 or 7 years *in island* being of the parts of Norway from Denmark, have procured the King's prohibition to the English to fish in those parts, and pray that it be enacted that

they may fish there and in any place, any proclamation or ordinance to the contrary notwithstanding. Answer, The King will be advised.]

[18. 6 R. 2. Protect. 46. By Belknap, *The sea is of the licence of the King, as of the Crown of England.*]

The sea is not only under the dominion of

the King, as is said 6 R. 2. Fitz. Protection 46. but it is also his proper inheritance; and therefore the King shall have the land which is gained out of the sea. Dav. 56. a. cites Dier 15 Eliz. 226. b. 22 Aff. p. 93.

19. 17 E. 2. cap. 11. enacts, That the King shall have wreck of the sea throughout the realm; \*whales and †great sturgeons taken in the sea, or elsewhere within the realm, except in certain places privileged by the King.

Pl. C. 315. b. Arg. in the Case of [ 577 ] Mynes says, that this is

not a new law, but only a declaration of the common law before; and that Britton, who wrote long before the treatise of Prærogativa Regis, shews in his chapter of Trover, that the King should have all fish by the common law in his time.—Britt. 27. cap. 17.—The Lord of the Manor prescribed to have royal fish, and thereby claimed a porpoise taken; but by Belknap, where a fish is taken in the high sea, it belongs to the taker. 39 E. 3. 35. b.—Br. Prerogative, pl. 35. cites S. C.

\* Of a whale, it is sufficient if the King has the head and the Queen the tail. Seld. Fleta 67. lib. 1. cap. 46.—† But of a sturgeon the King shall have the whole by his royal privilege. Seld. Fleta 61. lib. 1. cap. 45.

20. It was resolved that the King shall have *flotsam, jetsam, and ligan*, when a ship perishes, or when the owner of the goods cannot be known; for in 46 E. 3. 15. it appears that goods cast into the sea for fear of a tempest, are not forfeited. 5 Rep. 107. a. b. Pasch. 43 Eliz. in Sir Henry Constable's Case.

S. P. By his prerogative, tho' they are in or upon the sea; for the sea is of the allegiance

of the King, and parcel of his Crown of England. Ibid. 108. b. in S. C.

21. The King shall have *wild swans*, as *volatilia regalia*, upon the sea and branches thereof. Dav. Rep. 56. a. cites 7 Rep. the Case of Swans.

22. *Wreck of the sea* is a perquisite royal. Dav. Rep. 56. b. cites 5 Rep. 107. Sir Henry Constable's Case.

### (C. a) Impositions.

[1. THERE is an ancient imposition in Spain called the *alcavella*, which is the tenth part of all that which is bought and sold. Lib. Success. 208.]

[2. The Kings of France cannot justly impose taxes upon their subjects, without the assent of the 3 estates, unless it be in case of *present necessity*; and Lewes 11th King of France was the first who usurp'd this power. Philip de Commines, Lib. 5. fol. 197.]

(D. a) *Impositions. Customs. Who may impose them or take them.*

[1.] IF a man takes 2d. for every barrel of ale which shall be landed at a certain place near the sea coast, it is not lawful tho' it be his own land, and the parties cannot sell there without his consent; for it is levying a new custom when he takes a constant certain sum, which he cannot do without the King's licence; but he may make particular agreements with every one that comes there, for his consent to land their goods there. P. 11 Car. B. R. between the King and Morgan, upon a trial at bar in an information against him, for levying of 2d. for every barrel landed at Crockernepill in com. Somerset near Bristol; resolved per Curiam, and he found guilty accordingly, and fined 100 marks, and imprisoned by judgment of Court upon an information upon one of the articles in Eire, that it shall not be lawful for any to raise a tax, rate or custom upon the King's subjects in his own land.]

[ 578 ] 2. Babington Ch. J. said, that the Kings of England are intitled to have the petit custom of merchandizes, but not the great custom, and that he has it but for a certain time by act of parliament; but this great custom is called subsidy; and so see that King H. 6. had this subsidy, and after King E. 4. obtained grant thereof by act of parliament for term of his life, and so every King after him has obtained such grant by parliament, which is granted to the intent that the King by his Admiral shall keep the sea that merchandizes may pass and re-pass in safety. Br. Customs, pl. 26. cites 9 H. 6. 12.

(E. a) *What Impositions the King may grant without Parliament.*

See pl. 20. —S. P. but he may not charge them without special assent of parliament to their charge. 12 Rep. 32. cites 13 H. 4. 16. —[1.] THE King may charge the subject where it is for the subject's benefit, scilicet, where the subject has quid pro quo: 13 H. 4. 14. b.]

For the benefit of the subject the King may make an imposition or toll within the realm; as, to repair highways, bridges, and to make walls for defence; but then the sum impos'd ought to be proportionable to the benefit. 12 Rep. 34. cites 13 H. 4. 16. —Impositions, neither in the time of war or other the greatest necessity or occasion that may be (much less in the time of peace), neither upon foreign nor inland commodities of what nature soever, be they never so superfluous or unnecessary, neither upon merchants, strangers, nor denizens, may be laid by the King's absolute power without assent of parliament, be it for never so short a time. 2 Molloy 320. cap. 12. f. 1.

[2. As the King may grant to another, that he shall inclose a vill, and that he shall take a half-penny or other sum of every horse and cart-load which passes thro' the same vill for the inclosure. 13 H. 4. 14. b.]

[3. So the King may grant *pontage*, and that he shall take of every \* load a certain sum for making the bridge with the same money; for it is for the people's profit. 13 H. 4. 14. b.]

\* Orig.  
(summage).

[4. So the King may grant that I shall have a \* *ferry* over a certain water adjoining to my own land, and take of every one a half-penny more or less; and this is good, because those who shall make the payment have *quid pro quo*. 13 H. 4. 15.]

\* Orig.  
(fairc.)

[5. 32 E. 1. Rot. Pat. M. 26. In schedula annexa quidam constituuntur ad assidendum tallage in civitat. burgis & dominicis Regis per Angliam *per capita vel in communi* prout ad commodum nostrum viderit expedire *secundum facultat. tenent.*]

[6. 9 E. 1. Rot. Pat. Memb. 27. *De subventionem facienda pro reparatione \* Pontis London.*]

\* See pl. 7.  
11, 14.—  
London-  
Bridge be-

ing in great decay, and like to fall, not only King John by his charter 3 Johan. No. 2. commanded it to be repaired, but likewise E. 1. granted a patent for a charitable collection through all England towards its reparation. And also impos'd a custom or imposition of pontage for sundry years upon several commodities, and on every cart, packhorse, other carriages and passengers, towards its repairs, Brynne's Animadv. on 4 inst. 183. 184. cites Pat. 9 E. 1. M. 27 Pat. 10 E. 1. 8. and Pat. 10 E. 1. M. 18. and which are printed there at length.

[7. 14 E. 1. Rot. Wall. Memb. 6. in 19 E. 1. The King granted *to a vill custom de rebus venalibus* for such time; *ad tuitionem & securitatem partium illarum*, and now recites, that the time is past, de gratia ampliori he grants it to them for other time *ad vill. claudend. & pontes reparand. for four years, completo autem termino illo dicta consuetudines penitus cessent & deleantur &c.*]

[8. 3 E. 1. Rot. Pat. Memb. 13. *Villa Salop \* pavianda*, the King grants *to the vill to take so much of all things sold there for 3 years &c.* Ita quod completo termino it should cease &c.]

\* See pl. 10,  
13.—An  
imposition  
was granted  
the citizens

of London to pave and mend the streets and highways, Temple-Bar, and Westminster, Chancery-Lane, Shoe-Lane, Fetter-Lane, from Portolbrig to Tyburn, and from London to Highgate. Brynne's Animadv. on 4 inst. 186. cites Pat. 9 E. 1. M. 25. Pat. 37 E. 3. Part 1. M. 47. Pat. 40. 3 E. Part 2. M. 40. Pat. 51 E. 3. M. 7. Pat. 4 R. 2. Part 1. [ 579 ]  
M. 21.

[9. 3 E. 1. Rot. Pat. Memb. 17. *Pro \* muragio* of a vill in Ireland, the King grants to the vill *consuetudinem of things sold there for 7 years*, ita quod completo termino it should cease &c. M. 22. Grant of Custom as above to the vill of Nottingham pro muragio for a certain term &c.]

\* See pl. 12,  
14.—So  
for murage  
of the city  
of London,  
which was  
then very  
much out

of repair. Brynne's Animadv. on 4 inst. 184. cites Pat. 10 R. 2. Part 1. M. 30. which is there set forth at length.

[10. 6 E. 1. Rot. Pat. Memb. 3. *Toll for 5 years* granted to the burgeses of Salop *for paving the vill*, and the toll put in certain how much they shall take for every thing sold.]

Fol. 171.  
bis.

[11. Memb. 4. fol. 10. Toll to the town of *Huntingdon pro reparatione pontis for three years.*]

[12. 7 E. 1. Rot. Pat. Memb. 22. Toll is granted for three years to the mayor, sheriff, and citizens of *London* of all merchandizes

Brynne's  
Animadv.  
on 4 inst.

186. says, he finds an imposition granted to the citizens of London by E. 2. towards the building of a new tower on the wall near the Friar Preachers. Pat. 10 E. 2. Part 2. M. 11. chandizes in auxilium reparationis muror. & clausurarum civitat. predicta.]

See pl. 8. [13. 1 E. 2. Rot. Pat. 1. Par. Memb. 1. *Consuetudines* granted *de rebus venalibus* &c. for pavement.]

[14. 18 Memb. 10. 12. & 1 E. 2. Pars 2. Memb. 11. accord. & Memb. 7. for *Murage*, and Memb. 8. *Murage and Pont.*]

[15. 16 E. 1. Rot. Fin. Memb. 1. *De 4 solidis capitis de singulis doliis vini de Breglaw capitis*, per mandatum domini regis, more at large in 8 and 10.]

[16. 18 E. Rot. Fin. Memb. 13. Cum Rex dudum precepisset ut *de singulis doliis vini* honori Sancti Cumham & etiam alior. apud Petram fixam vel Lysternam fiat. & ad terram regis venientibus quorumcunque essent ad opus regis ob certas causas *caperentur quatuor solidi sterlingor.* commanded to levy them as arrearages. A. 18 Maii, 16 E. 1. plus in 14 to such purpose &c.]

Fryne's  
Cott. Rec.  
Abr. 17.  
No. 4. says,  
The grant  
was a disme  
and a fif-  
teenth to be

levied of the laity, so as the King will live of his own without grieving his subjects with outrageous prizes or such like; and thereupon revok'd the new commissions for rearing of tallages, and promised thenceforth to remite the same according to the old rate.

[17. 6 E. 3. Rot. Parl. Memb. 4. The parliament granted to the King a 15th, and the King at the request of them granted that the commissions lately granted to assess *tallage* in all cities, boroughs, and demesnes throughout England should cease, and the like should be no more.]

Repealed by  
12 Car. 2.  
24.

[18. 1 E. 3. cap. 7. Whereas commissions have been awarded to certain people of shires to *prepare men of arms*, and to convey them to the King into Scotland or Gascoign, or elsewhere, at the charge of the shire, the King hath not before this time given any wages to the said preparers and conveyers, nor soldiers whom they have brought, whereby the commons of the counties have been at great charge and much impoverished, the King wills that it shall be so done no more. 4 H. 4. cap. 13. this statute is confirmed.]

[19. 14 E. 3. cap. 1. It is enacted upon the grant of the King, that the *Prelates, Earls, Barons*, and Commonalty shall not be from thenceforth charged or grieved to make any aid or sustain charge if it be not by the common assent of the *Prelates, Earls, Barons*, and other great men and Commons of our said realm of England, and that in the parliament. (This was upon a grand subsidy granted to the King.)

[ 580 ]  
See pl. 1.

[20. The King cannot charge the subjects by an imposition, unless it be for the benefit of the subjects who shall be charged, and where they shall have *quid pro quo*. 13 H. 4. 14. b. Co. 11. Monop. 86. b.]

[21. The hospital of St. Leonard of York was founded by the King of England, and endowed by him of a thrave of corn to be taken

taken yearly of every plough earing within the counties of York, Cumberland, Westmorland, and Lancaster, within the province of York, of which thraue the hospital was seised time out of mind, and after in time of H. 6. \* denied to have this, whereof they have no sufficient nor convenient remedy at the common law, and for this prayed aid by parliament, and it was granted. 2 H. 6. cap. 2.]

\* Orig. (deien).

[22. Among the ordinances of 5 E. 2. made by commissaries, there is such ordinance, That all manner of customs raised since the coronation of E. 1. be utterly void, notwithstanding the charter of E. 1. made to merchants-strangers, because it was against the great charter, and the \* liberties of the city of London, and without the assent of the baronage, saving to the King for wool, leather, &c.]

\* Fol. 173. bis.

[23. Rot. Parl. \* 20 E. 3. N. 13, 14. The King confirms the ordinance of the last parliament, not to charge the subjects with arms &c. The like 21 E. 3. N. 17. 44.]

\* Prynn's Cott. Rec. Abr. 48. No. 13 is, That such

as were fin'd for not arraying of men may therefore be discharged; to which the King answered, that he will be advised. And ibid. No. 14. is, 'That all within 6 miles of the sea may have a superseas for arraying of men. The answer was, that such as keep the sea coasts shall have a superseas.

[24. 25 E. 3. cap. 8. It is accorded and assented, that no man shall be constrained to find men of arms, hoblers, nor archers, other than those which hold by such service, if it be not by common assent and grant made in parliament. 4 H. 4. cap. 13. this statute is confirmed.]

[25. Rot. Scot. 8 E. 2. M. 8. dorso. The King prays every vill to send unum peditem.]

[26. 36 E. 3. cap. 11. Rot. Parl. 36 E. 3. N. 26. The Commons make a grant to the King of wools, leather, and woolfells for three years, but that it shall not be had in example or charge of the commons in time to come, and that the merchants-denizens may pass with their wools as well as the \* merchants-strangers, without being restrained, and that no subsidy or other charge be laid or granted upon the wools by the merchants, nor by any other in time to come, without the assent of the parliament † 17 E. 3. Rot. Parl. N. 28. The merchants grant to the King a tax upon wools, and upon this the commons complain in parliament, because the merchants gain by it, and the other commons of the realm pay for it, for the merchants sell more dear, and for that reason.]

\* Orig. is (foreigns). † Prynn's Cott. Rec. Abr. No. 28. is, that customs of wool may be at a mark according to the old order, and the 40 s. revok'd, seeing the same was the grant of the merchants

which bindeth not the commons. The answer was, that it cannot be hurtful to the commons, since upon their price set, order was, that no man should buy under.

[27. Rot. Parl. 25 E. 3. 1 Part, N. 22. Commons complain of a grant of 40 s. upon a sack made by the merchants, which falls in charge of the people, and not of the merchants; but upon shewing of the necessity of the King, it is granted to him for three years by parliament.]

Prynn's Cott. Rec. Abr. 75. No. 22. is, that the petition was, that the subsidy

of wool, viz. of every sack may cease. The answer was, that the same was granted for a time yet enduring.

[28. Rot. Parl. 22 E. 3. N. 4. Fifteenths granted to the King upon condition to be entred upon the roll in parliament, scilicet, among other things that the subsidy granted of 40s. upon a sack of wool for 3 years, cease at the end of it, and that from henceforth no such grant be made by the merchants, \* since it is only in grievance and charge of the commons, and not of the merchants who buy † for so much, be it better or worse. Another condition is, that the merchants who have deceived the King in a sack of wool be not pardoned &c.]

\* Orig. is (desicome.)  
† Orig. is (de tant de leux au mieux.)

\* They are called mala tolmeta, when the thing demanded for wares or merchandises do so burden the commodities as the merchant

[29. 25 E. 1. cap. 7. And forasmuch as the more part of the commonalty of the realm find themselves sore *grieved with the \* male-tolt of wools*, that is to say, a toll of 40s. for every sack of wool, and have made petition to us for to release the same, We at their request have clearly released it, asid have granted for us and our heirs, that we shall not take such things without their common assent and good will, saving to us and our heirs the custom of wool-skins and leather granted before by the commonalty afore said.]

cannot have a convenient gain by trading therewith, and thereby the trade itself is lost or hindered. And in divers statutes maletrot or maletot or maletout is a French word, and signifies an unjust vexation. 2 Inst. 58.—The King cannot set any new impost upon the merchant, and therefore the act 9 H. 2. cap. 3. provides not only affirmatively, viz. *per antiquas & rectas consuetudines, but privately also*, sine omnibus malis tolmetis, within which words new impositions are included, and here called *mala tolmeta*, as opposite to ancient and rightful customs or subsidies granted by authority of parliament. 2 Inst. 58.—Male-tolt was an impost upon staple commodities, per Fleming Ch. B. who said, that a great subsidy was given to the King for the repeal of this maletot, with this clause, viz. that it should never be drawn into precedent, which shews that this maletot was rightly imposed, or otherwise the parliament would never have given so great a recompence for the abrogation of it. Lane 30. Mich. 4 Jac. in Seacc. in Bates's Case.—But after in the 13 E. 3. because it was a thing of so great consequence to the Crown, it was reviv'd and made 40s. for wool and woollfells, and 31. for leather for denizens, and double for strangers; and in the 14 E. 3. a petition in parliament was to abate it, and for a great subsidy it was released; and in the 18 E. 3. it was reviv'd again, and a new petition was made in parliament, and this petition was continued until the 26 E. 3. and then it was abated, and also by the 25 E. 3. it was again abated (so that it seems that between these times it was reviv'd), but it did not continue long; for in 28 E. 3. it was again reviv'd, and for wool the impost was 50s. & sic de singulis. And in 1 R. 2. after, it was answer'd to the King, as appears in the accounts here. And in 5 R. 2. it was again suppress'd by parliament for a subsidy granted to the King, with a saving of ancient rights. All these statutes prove expressly, that the King had power to increase the impost, and that upon commodities of the land, and that he continually used this power notwithstanding all acts of parliament against it. Per Fleming Ch. B. Lane 30. Bates's Case.

[30. 34 E. 1. cap. 3. *Nothing from henceforth shall be taken of sacks of wool by colour or occasion of maletolt.* It seems by 22 E. 1. Rot. Fin. Mcmb. 2. that this custom was granted by the merchants.]

The King had obtained by free consent and good will in parliaments precedent aids, subsidies or taxes, for

[31. 25 E. 1. cap. 5. 6. Forasmuch as divers people of our realm are in fear that the aids and taxes which they have given to us before-time towards our wars, and other business of their own grant and good will (howsoever they were made), might turn to a bondage to them and their heirs, because they might at another time be found in the rolls, and likewise for the prises taken throughout the realm by our ministers, We have granted for us and our heirs, that we shall not draw any such aids, taxes nor prises, into a custom, for any thing that hath been done heretofore, be it by roll or any \* other precedent that

\* Fol. 174 bis

that may be found. And further we have granted to all, Spiritual, Temporal, and Commons, that for no business from henceforth we shall take such manner of aids, taxes, nor prises, but by the common assent of all the realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed.]

the maintenance of his wars in foreign parts, which howsoever they were granted in full parliament, yet (as here appeareth) many men doubted might turn in servage of the subjects of the realm; for that it was holden that they ought not to contribute to the maintenance of the King's wars out of the realm; and thereupon Bohun Earl of Hereford and Essex, [ 582 ] High Constable of England, and Bigot Earl of Norfolk and Suffolk, and Marshal of England, (for that it concerned matter of arms and war) exhibited a petition to the King in French, in anno 25 E. 1. before the making of this act, which Lord Coke says he has seen anciently recorded on behalf of the Commons of England, concerning the said matter; and thereupon the King at this parliament yielded to this act, that such aids, taxes or takings should not be drawn to custom for any thing that had been done in that behalf. 2 Inst. 523.

[32. 34 E. 1. cap. 1. No tallage or aid shall be taken or levied by us or our heirs in our realm, without the good will and assent of archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land. Rot. Parl. 25 E. 2. 2 Part. N. 12. accordingly.] \* 12 Rep. 32. S. P.

[33. Rot. Parl. 22 E. 3. N. 4. That no imposition, tallage, nor charge \* by way of loan or other whatsoever manner be laid by the Privy Council of the King without the assent of the Commons in parliament.] Prynn's Cott. Rec. Abr. 69. No. 4. same year and roll. but

not S. P.—\* Orig. is (da prester.)

[34. Rot. Parl. 22 E. 3. N. 4. Upon grant of fifteenths, the Commons shew their great charges, scilicet the reasonable aid which was pardoned by the statute in the 14th year, whereby every fee is charged of 40s. without grant of the Commons, whereas by statute the fee should be charged but of 20s. \* the which charges are levied of the Commons; and thereupon they granted the fifteenths upon certain conditions.] Prynn's Cott. Rec. Abr. 69. No. 4. — See supra, pl. 28. — \* Orig. is (la que.)

[35. Rot. Parl. 8 H. 5. N. 6. The Commons pray, that where the King and his progenitors time out of mind have been lords of the sea, and now by the grace of God it is come to pass, that our lord the King is lord of the coasts on both parts of the sea, to ordain, that upon all strangers passing over the said sea such imposition to the use of the King [be laid] to take what to him shall seem reasonable for the safeguard of the sea. Answer. The King will be advised.]

[36. 2 H. 4. N. 22. Because now of late diverse commissions were made to diverse cities, boroughs, and vills of the realm, to make certain barges and balingers without assent of parliament, and otherwise than has been done before this time, the same Commons pray the King, that the said commissions be repealed, and that they be of no force nor effect. To which it was answered, that the said King wills that the said commissions be repealed in all points; but for great necessity which he has of such vessels for defence of the realm, in case the wars \* happen, the King will commune of this matter with the Lords, and

Prynn's Cott. Rec. Abr. 406. No. 22. — \* Orig. is (se preig-nent.)

then after shew it to the said Commons for the having their counsel and advice thereupon.]

Frynne's  
Cott. Rec.  
Abr. 70.  
No. 8. That  
all wool and  
other mer-  
chandises  
may freely  
pass without  
any loans or  
other sub-  
sidies over  
the due customs. — \* Orig. is (Apprests) — † Orig. is (aunt.) — ‡ Orig. is (le a Prift.)

[37. Rot. Parl. 22. E. 3. N. 8. The Commons pray, that *passage of wools and other merchandizes be open without making \* loans* over, and besides the custom from the merchants, and † other the customs of the King for a certainty, ‡ the which loan turns all to the profit of the said merchants in outrageous grievance and mischief of your Commons. Answer, Be the passage open, and that every one pass freely, saving to the King that which is due to him.]

\* Orig. is  
(Arct.)

[38. Rot. Parl. 38 E. 3. N. 11. enacted, That *merchants may freely merchandize all manner of merchandizes without being* \* confined to any, notwithstanding any charter.]

[ 583 ]  
\* Orig. is  
(depardela.)  
Frynne's  
Cott. Rec.  
Abr. 537.  
No. 40 of

[39. Rot. Parl. 1 H. 5. N. 41. The Commons pray that all merchants may *export to any place* \* *from any place, or import any goods (except goods of the staple) at their pleasure, paying the customs and other duties due to you, any proclamation to the contrary notwithstanding &c.*]

the same year, seems to be same roll, and is as here, but mentions arras in particular, and that they may sell to all men except to the merchants of Jeane, paying their due customs: and the answer was as in pl. 40. here.

[40. Answer. The King will be adviced by his council. (It seems *this was against companies*).]

Fol. 175.  
bis.

[41. Rot. Parl. 45 E. 3. N. 42. Pray that no imposition or charge be laid upon *wool-fells*, \* *wools and hides*, other than the custom and subsidy granted to the King, without assent of parliament. Answer, The King consents, and that none be laid after the statute be repealed.]

\* Orig. is  
(Launts &  
Queres.)

Frynne's Cott. Rec. Abr. 114. No. 42. says, The print touching the impositions on wools, cap. 4. agrees with the record. — Rot. Parliam. 45 E. 3. No imposition or charge &c. shall be set without assent of parliament. 2 Inst. 61.

[42. 9 H. 6. 13. By Babington, in this grant (scilicet, of the subsidy of *tonnage and poundage*) the *king is not inherited* but for certain time by authority of parliament; *but of petit customs he is inherited*. Br. Customs, 26.]

Frynne  
Cott. Rec.  
Abr. 75.  
No. 27.  
That the  
payment of  
merchants  
for waisting  
over their  
goods, may  
cease. —  
Mr. Frynne  
adds, that

[43 Rot. Parl. 25 E. 3. 1 Part, N. 21. The Commons pray that where 6d. of the pound and 2s. of a sack of wool, and 40d. a ton of wine, was *granted by the merchants for having conduct over the sea*, for saving their lives and merchandizes there, *whereas no conduct at any time was*, by which the merchants have lost their lives and merchandizes, to great dishonour of our lord the King, undoing of the merchants, and to the great damage of his people, *that it please the King that the merchants may make their own conduct* for saving of their lives and merchandizes, and that the customs aforesaid cease, and be

\* be not demanded. Answer. The King will be advifed, and thereupon will answer them in † proper manner.]

such pay-  
ments in  
short time  
grew to

a custom called tonnage and poundage.——\* Orig. is (ne foient mes demandes)——† Orig. is (coveable.)

[44. 47 E. 3. A fubfidy of 6d. of every pound of merchandize (except wools &c.) exported and imported, and 2s. of every tun of wine for one year without confideration, but for the fecond year upon confiderations, if the war continue &c.]

[45. 5 R. 2. cap. 3. *Upon the proffer made in parliament by the mariners of the weft, to make an army upon the fea for two years, the Lords and Commons grant to the King a fubfidy of 2s. upon every tun of wine, and 6d. of the pound for all merchandizes exported and imported as well of woollen clothes, as of other merchandizes (except wools, woolfels, and leather), befides the customs due by two years &c. So always that the money thereof coming be wholly applied upon the fafe keeping of the fea, and no part elfewhere; and at the request of the Commons, the King willed, that two men there named fhould be the receivers and keepers of the faid fubfidy, and certain other perfons to be affigned by the King to be comptrollers to the faid collectors; and the people being in the faid army fhall have wholly all their gains and profits to be parted betwixt them during the faid army abovesaid; and the admirals and other of the faid army fhall be affured to fave the King's friends and allies without damage to be done to them or any of them by any way; and if they do, and that be duly proved, they fhall bind them upon a grievous pain thereof duly to make amends.* [ 584 ]

46. 50 E. 3. No. 182. Prynne's Cott. Rec. Abr. 138. The Commons petition, that fuch as fhall of their own authority lay new impositions without affent of parliament, may lofe life, member, and other forfeitures. Answer, Let the common law, heretofore ufed, run.

47. In the Parliament Roll at large, of 51 E. 3. No. 25. the prelates, dukes, earls, barons, commons, citizens, burgefles, and merchants of England, in this parliament, petition the King not only for a pardon in general, and of fines and amer-ciements before the Juftices of Peace, not yet levied in fpecial (which Cotton's Abridgment only toucheth), but they likewise fubjoin thereto this memorable request (totally omitted by the Abridger), which Mr. Prynne fays he thought meet here to fupply; viz. *That in time to come, your faid prelates, earls, &c. may not be henceforth charged, molefted, nor grieved to make any common aid, or fustain any charge, unlefs it be by common affent of the prelates, dukes, lords and barons, and other people of the commons of your realm of England, and that in full parliament: nor no impositions put upon their wools, wool-fells, and leather, or any the ancient custom; that is to fay, of one fack of wool, half a mark, and of 300 wool-fells, half a mark; and of one laft of fkins, one mark of custom only; according to the ftatute made the 14th year of your reign; faving to you the*

the subsidy, granted unto you the last parliament for a certain time, and not yet levied. To which last clause the King then gave this answer; and as to that, That no charge be laid upon the people without common assent the King is not at all willing to do it without great necessity, and for the defence of the realm, and where he may do it with reason. And as to that, That impositions be not laid upon their wools without assent of the prelates, dukes, earls, barons, and other people of the commons of his realm; there is a statute already made, which the King wills that it shall stand in it's force. Prynn's Cott. Rec. Abr. 152. where Mr. Prynn desires the Reader to take notice of this.

2 Inst. 63. Lord Coke says, that the common opinion was, that this judgment was against law and divers express acts of parliament.— But 12 Rep. 32. Lord Coke says, Note, upon a conference between Popham Ch. J. and myself, upon a judgment given lately concerning the imposition on currants; and upon consideration of diverse books and statutes, and diverse records which we have seen, it appeared to us that the King cannot at his pleasure put any imposition upon any merchandize to be

imported to this kingdom, or exported, *unless it be for advancement of trade and traffick* (which is the life of every island) *pro bono publico*; as if in foreign parts any imposition is put upon the merchandizes of our merchants non pro bono publico, and to make equality, and advance trade and traffick, the King may put an imposition upon their merchandizes; for this is not against any of the statutes, which are made for advancement of trade and merchandize, or of the statute of *magna carta cap. 30.* which is *si aliqui mercatores de terra contra nos guerrina inveniantur in terra nostra in principio guerræ, attachiantur &c. Quo modo mercatores terræ nostræ tractantur,* qui

48. An information was exhibited against B. a merchant of the Levant, reciting that the King by his letters patents under the great seal, had commanded his treasurer to command the customers and receivers to ask and receive of every merchant denizen, who brings within any port within his dominions currants, 5 s. 4 hundred for import above 2s. 6d. which was the poundage by the statute of every hundred; and it was alleged that B. had notice thereof, and that he had brought currants into the port of London, and refused to pay the said 5s. in contempt of the King. B. pleaded that he is an English merchant, and an adventurer, and a denizen, and that he made a voyage to Venice, and there bought currants, and imported them into England; and recited the statute 1 Jac. 33. which grants 2s. 6d. for poundage, and said that he had paid that, and therefore refused to pay the 5s. because it was imposed unjustly and unduly against the laws of the land; whereupon the King's attorney demurred. And Fleming Ch. B. in his argument said, that the state of the case is touching a new custom; that impositions or customs are duties, or sums of money newly imposed by the King without parliament on merchandizes; and that here the imposition is not upon B. nor the Venetian merchants, but upon all men who import currants. That the imposition is properly upon currants, and for them, and not upon the defendant nor his goods, who is a merchant; for upon him no imposition shall be but by parliament. And the Duke of Venice having imposed upon our merchants a ducat by the hundred, which was foreseen to be a means that in time would waste the treasure of the land, therefore Queen Elizabeth granted to the company of merchants of the Levant, that none should bring currants but by their licence, and they impos'd upon them who did import, and were not of their company, if he were a denizen 5 s. if he were a stranger 10 s. and that this was paid by the merchants without contradiction. And after judgment was given for the King. Lanc 22. to 31 Mich. 4 Jac. in the Exchequer, Bates's Case.

*qui nunc inveniuntur in terra illa contra nos guerrina; et si nobis sunt ibi, illi salvi sunt in terra nostra* & for the end of all such restraints is *salus populi*; and so in this case of currants the imposition was imposed upon the said reason to make equality; and for the advancement of trade and traffick; and therefore such imposition was lawful.

49. 1 W. & M. Stat. 2. cap. 2. f. 1. declared among other things, that levying money for the use of the Crown by pretence of prerogative, without grant of parliament for longer time, or in other manner than the same is or shall be granted, is illegal.

(F. a) \* Tonnage and † Poundage.

[1. 1 H. 4. N. for three years.]

50s. upon sack of wool granted

\* Vide (F. a) pl. 43. in notes there—  
Tonnage is

a subsidy out of wines of all sorts, and was first granted by parliament 5 R. 2. where as. for every ton of wine, to be imported into England, was granted to the King for 2 years; and this was for maintenance of a fleet upon the sea, to suppress the pirates; but after by parliament 3 E. 4. tonnage was granted to this King for term of his natural life in this manner, viz. 3s. for every ton of wine, and (over and above those 3s.) for every tun of sweet wine 3s. more. See the statute 12 E. 4. cap. 2. And this subsidy was granted to H. 8. and E. 6. with this addition in the time of E. 6. that for every awm of Rhenish wine, also 12d. shall be paid. And after the time of E. 6. this subsidy of tonnage was granted by several acts of parliament to Queen Mary, Queen Elizabeth, and King James, during their natural lives. Dav. Rep. 11. a. b. Mich. 5 Jac. B. R. in the Case of Customs. — 2 Molloy 341. cap. 1. f. 8. S. P.

† Poundage is a subsidy granted out of all commodities exported and imported, except wines and the ancient staple wares, and payable by all merchants, denizens and aliens, and is the twentieth part of the value of merchandizes, viz. 12d. in the pound, and was first granted by parliament in England 31 H. 6. during the life of this King; which grant was immediately refused. But after this, viz. 3 E. 4. this subsidy of poundage was granted to the said King during his life; and the same grant was renewed to E. 6. Queen Mary, Queen Elizabeth, and King James, during their several lives, by several acts of parliament. Dav. Rep. 11. b. in the Case of Customs. — 2 Molloy 341. cap. 1. f. 8. S. P.

[2. 2 H. 4. N. 9. For defence and good government of the realm, 2s. of every ton of wine, and 8d. of the pound of all merchandizes (except wool-skins and \* sheep-skins &c.) granted to the King for two years.]

Prynne's  
Cott. Rec.  
Abr. 404.  
405. No. 9.  
\* Orig. is  
(peaux  
launts)

[3. Rot. Parl. 1 H. 5. N. 17. It was granted for \* a year under certain conditions. 2 H. 5. 2 Part. N. it was granted for three years, 3 H. 5. 2. N. 5. it was granted for life, but that it should not be put in example.]

\* Prynne's  
Cott. Rec.  
Abr. 535.  
No. 17. says  
it was granted  
for 4  
years.

[4. Rot. Parl. 3 E. 4. N. 24. The subsidy of tonnage and poundage granted by bill indented to Edward 4. for life, with diverse provisos added by the Commons.]

Prynne's  
Cott. Rec.  
Abr. No. 24.  
but is there  
mentioned

as in 4 E. 4. and takes no notice of any provisos.

[5. Rot. Parl. 14 E. 4. N. 46. The statute of tonnage and poundage recites, that where it was enacted in the parliament held 3 E. 4. whereas in the book printed it is recited to be held the 4 E. 4.]

[ 586 ]  
Fol. 176.  
bis.

Cott. Rec. Abr. 700. No. 46. says the print touching subsidies, cap. 3. agreeth with the record

[6. Rot. Parl. 1 R. 3. The subsidy of tonnage and poundage granted to R. 3. for life, saving to the merchants of Calais the customs of morling and shorling, and other provisos.]

Prynne's

## \* Customs

are duties certain and perpetual, payable to the King, as inheritance of his Crown for merchandizes transported over sea from one realm to another; for for things vendible by

## (G. a) \* Customs.

[1. + 4 H. 4. N. 28. **H**AVING considered of the war of Scotland, and rebellion in Wales, and safeguard of the sea, and of the marches of Calais, Guienne, and land of Ireland, granted to the King, especially for the defence of the realm of England, 50 s. a sack of wool, woolfells, and of skins &c. for three years; and for defence of the said realm 3s. of every ton of wine (except those which are taken to your use for prise), and 12d. a pound (except the things aforesaid, and  $\frac{1}{2}$  corn for cattle &c. but cloth is not excepted), to have it for two years and a half.]

way of merchandize, carried from one port to another within the same realm by sea or by land, no merchant is bound to pay any custom. Those duties called customs are divided into three kinds. 1st. *Magna & antiqua* customa. 2dly. *Parva & nova* customa. 3dly. *Prisage and butlerage*. And in all these the Crown has a certain and perpetual inheritance. 1st. The grand and ancient custom is payable out of native or home-bred commodities of three sorts, viz. wool, woolfells and hides. 2. The new and petit customs is 3d. in the pound, payable by merchant strangers only for all commodities by them imported and exported, as is expressed in the charter of 31 E. 1. 3. *Prisage* is a custom taken of wines of all sorts, [for which see (R) supra.] Dav. Rep. 8. a. b. Mich. 5 Jac. B. R. in Ireland, in the Case of Customs.—The ancient and grand custom is parcel of the ancient inheritance of the Crown, and is as ancient as the Crown itself; inherit sceptre, and is due of common right, and by prescription, and not by grant or benevolence of the merchants, or by act of parliament. Dav. Rep. 8. b. cites D. 1. Elis. 165. b. —But because every thing which is due of common right and by prescription ought to have reasonable cause of commencement, it was noted and observed that this custom was first paid to the Crown for four principal causes or reasons. 1st. For leave to depart the realm, and to carry the commodities of the realm out of it. Vide D. 1. Elis. 165. b. and the statute of 18 E. 3. cap. 3. 2. For the interest which the King has in the sea, and in the arms thereof. 22 Aff. pl. 93. 15 Elis. D. 326. 3. Because the King is guardian of all the ports and havens of the realm, which are *ostia seu janua regni*, and the King is *custos totius regni*. 4. For wastage and protection of merchants upon the sea against the enemies of the realm, and against pirates, who are common enemies to all nations. Dav. Rep. 9. b. in the Case of Customs.—The petit and new custom payable by merchant strangers only had commencement in the 4 time of E. 1. for before this time the duties payable by merchant strangers for all foreign commodities imported (except wine) and for all native commodities exported (except the staple-ware of wool, woolfells and hides) were uncertain; for the King by his prerogative took to his use and at his price, so much and such portions of their merchandizes as he had need, by name of prises, which were always uncertain. Dav. Rep. 9. b. in the Case of Customs.—*Prisage* of wines is also a custom due by prescription, [but for this see (R).] Dav. Rep. 1. a. in the Case of Customs.

+ 31 E. 1. No. 44. and see the charter at large, and matters relating thereto, Prynn's Animadv. on 4 Inst. 23 to 26. —Molloy 330 to 341. cites the same charter; and see 2 Molloy 317. 328. f. 6. 7. S. P. as to *magna customa & antiqua & parva customa*.

Hale Ch. B. said, that certainly a custom was due to the King at the common law for wool, woolfells, and leather, long before the giving of half a mark by the statute of E. 1. and that appears by the Red Book in the Exchequer, but not according to the proportion settled by that statute; but some custom was due and paid. Hard. 214. Mich. 13 Car. 2. in Scacc. in Case of Vere v. Sampson.—But see Vaugh. 161. 162. Hill. 23 & 24 Car. 2. C. B. in Case of SNEYFORD v. GOSNOLD, that those customs called the old or antique customa, were granted to King Ed. 1. in the third year of his reign by parliament as a new thing, and was no duty belonging to the Crown by the common law.

† Prynn's Cot. Rec. Abr. 418, No. 23. mentions the grant, but not the reason of giving it. —[Orig. is (Blec Beftaile.)]

Prynn's  
Cott. Rec.  
Abr. 406.

[587]  
No. 18  
seems to be  
the same as  
mentioned

[2. 2 H. 4. N. 17. The Commons shew to the King, that whereas at the last parliament they granted the *subsidy of wools* to continue for certain time &c. and now lately the Commons have understood, that the same King has granted to diverse persons certain annuities to take for term of their lives of subsidies of wools against the form of the said grant, and in very great discomfort

discomfort and desolation of the said Commons, by which the said Commons pray, that all patents ~~to~~ granted of the said annuities to take of the said subsidies be utterly revoked and repealed, and that the same subsidy ~~be~~ \* disposed of to the use for which it was granted, which prayer seems to our lord the King just and reasonable, and he has consented to it.]

here to be  
No. 17.

\* Orig. is  
(dependus  
en le Oepr.)

[3. 51 H. 3. 113. B. Stat. of the Exchequer, the two principal collectors of the custom of wools shall pay all money which they have received of the said custom, and shall make account from year to year of all parcels received in any ports or other places of the realm. Vide residuum. (It seems this custom was given for a time.)]

[4. Among the petitions of the parliament of the 18 E. 1. there is such petition, Ballivi Johannis de Brittan in com. Eborum exigunt novam custumam de quolibet animali, excepto &c. videantur recorda &c. & mandatur seneschallo quod sit coram iusticiariis ad placita regis ostensurum &c. & interim animalia replegentur.]

[5. 16 E. 1. Rot. Pat. M. 13. Custodes nove custume per totum regnum de lanis pellibus & coriis. 13 E. 1. Rot. Pat. M. 5.]

[6. 10 E. 1. Rot. Clauso Memb. 4. Mandatur vic. Northumb. de levanda pecunia nove custume &c. & special. fuit ad Memb. 5. 24 E. 1. Rot. Clauso. Memb. 5. collectoribus nove custume.]

[7. 14 E. 3. 21. The King grants for him and his heirs not to demand, assess, or take, or suffer to be taken of any Englishman more custom of a sack of wool than 6s. 8d. and upon woolfels and leather the ancient custom.]

Prynne's  
Cott. Rec.  
23. No. 21.  
is not to this  
purpose.

8. 3 E. 1. Rot. Finium Memb. 24. By the new custom, which is granted by all the great men of the realm, and by the prayer of the commons of the merchants of all England it is provided, that in every in the vill where the port is, shall be chosen two of the most knowing and most puissant, that the one \* piece shall be in the custody of one, and one who shall be assigned by the King shall have another piece, and shall be sworn, that they will duly receive and answer the King's money, that is to say, of every sack of wool half a mark, of every 300 † pelts, which are a sack, half a mark, and of every last of ‡ hides a mark, issuing out of the realm, as well in Ireland, in Wales, as in England, within franch. and without in every port, || where, if they may issue, shall be two honest men sworn, who shall not suffer the pelts nor hides &c. under pain of forfeiture &c. ib. eadem Memb. 1. in Latin more often called nova custuma. In dorso & tota communitate Angliæ.]

\* Orig. is  
(le une pece  
de un ferra  
en garde)

† Fol. 177.  
bis.

‡ Orig. is  
(Quire.)  
|| Orig. is  
(ou si pount  
issierleques.)

[9. 25 E. 1. cap. 7. The King releases the maletolt of wool, saving the custom of wool &c. granted before by the commonalty. Vid. same Custom mentioned in 27 E. 3. cap. 1. \* Such Rot. Pat. 3 E. 1. Memb. 1, 2. Vide Rot. Fin. Memb. 24. in dorso, this grant is recited, and the King demands such grant to be made

\* Orig. is  
(tel.)

† Orig. is  
(de ccla.)

made in Ireland &c. Convocatis omnibus &c. Ibidem in dorso recited to be granted by parliament *pluribus de causis ad rogationem regis* &c. three or four foris ibidem in dorso, and grant † thereof in Ireland by the parliament of England. Note, that this grant was to E. 1. and his successors &c. Vid. ib. Memb. 23. in dorso plus &c. Vid. Memb. 25. 6 E. 1. Rot. Pat. Memb. 20. Collectors & custodes made of this new customs in Ireland &c. and vid. this.]

[ 588 ]

[10. 10 E. 1. Rot. Fin. Memb. 5. De nova custuma regis in Hibernia commissa &c.]

[11. 10 E. 1. Rot. Fin. Memb. 4. the same.]

[12. 28 E. 1. Rot. Fin. Memb. 5. The King assigned one to receive *custuma lana coriorum* &c.]

Frymne's  
Cott. Rec.  
Abr. 598.  
No. 12. does

[13. 9 H. 6. 12. The Queen had an annuity granted to her by the King out of magna custuma.]

not touch this point.—S. C. cited Dav. Rep. 9. a. b. in THE CASE OF CUSTOMS. And adds that this is an argument that the King has a greater estate in the grand custom than for his own life.

[14. 36 E. 3. cap. 11. it is enacted, That after 3 years (which was the time that more was granted by the parliament) that *nothing shall be taken or demanded of the commons, besides the ancient custom of half a mark upon a sack of wool* &c.]

[15. 1 E. 1. Rot. Pat. Memb. 5. *Proclam. quod mercatores exerceant per antiquas consuetudines absque onere novarum consuetudinum & exactionum* &c.]

[16. 22 E. 1. Rot. Fin. Memb. 2. Pro mercatoribus Hibernie de custuma lan. pell. & corior. &c. licet in subsidium guerre quam pro recuperanda terram nostram Vascon. contra Gallicos movere intendimus mercatores regni nostri gratanter concess. quod de quolibet sacco lane fracte, que per biennium vel triennium, si tantum durant guerra nostraz, de nostro reyno ad partes transmarinas ducet. habeamus 5 marcas; & de quolibet sacco lane alterius vel pellium lanatarum que similiter transducent. tres marcas; & de quolibet lasto corior. quæ similiter transducent. quinque marcas; volentibus tamen mercatoribus Hibern. quibusdam de causis gratiam in hac parte facere specialem vobis mandamus quod de quolibet sacco lane vel pellium lanatarum & similiter de quolibet lasto corior. de quibus dimid. marc. prius capi solebat ad custuma, capi faciat unam marcā durante guerra predicta &c.]

[17. 31 E. 1. Rot. Fin. Memb. 16. De nova custuma in Hibernia colligenda &c.]

[18. 35 E. 1. Rot. Fin. Memb. 13. De exitibus custumæ vinorum in Hibernia &c.]

[19. 31 E. 1. Rot. Fin. Memb. 5. Customer assigned ad colligend. tam novas custumas quam antiquas concessas &c. a mercatoribus &c. Memb. 6. De supervidendo negot. nove custume de mercatoribus Angl. colligend. at large throughout &c. Memb. 12. De nova custuma in London colligend. Memb. 20. Of removing of officers de \* nova custuma, and making of others &c. Memb. 14. De nova custuma colligenda &c.]

\* Fol. 178.  
bis.

[20. 31 E. 1. accordingly throughout. 1 E. 2. Memb. 9. 2 E. 2. M. 5.]

[21. 35 E. 1. Memb. 10. Recital of a grant of nova custuma by the merchants &c. Ibid. Memb. 11. which [was] granted pro libertatibus.]

[22. 30 E. 1. Rot. Pat. M. 1. 34 E. 1. Rot. Fin. M. 5. Grant of Custom pro vino for liberties 4. in ducatu for all such wine quod in regnum & unde frettum marinariis solvere tenebantur.]

[23. 16 E. 2. Rot. Fin. Memb. 4. De custuma 28. de vinis colligend. 35 E. 1. Rot. Fin. M. 13. De exitibus custume vinor. in Hibernia &c.]

[24. 4 E. 2. Rot. Fin. M. 14. De custuma vini colligenda granted to E. 1. for liberties.]

[25. 31 E. 1. Rot. Chart. Memb. 3. 44. King grants diverse liberties to merchants-strangers, for which the said merchants grant to the King and his heirs increase of their ancient customs of wine, hides, pellium lanatarum &c. diverse other things, and the time and in the end the King grants for him and his heirs, that nothing more shall be imposed &c. Vid. the Custom of Strangers mentioned in 27 E. 3. cap. 1. scil. of every sack of wool 10s. of every 300 woollfells 10s. of every last of leather 20s.]

[26. 5. E. 3. Rot. Fin. M. 15. De novis custumis colligendis recited to be granted to E. 1. pro libertatibus.]

[27. 1 E. 2. Rot. Pat. Part 1. M. 4. confirms novam custumam lanar. pell. &c. ultra antiquam custumam per mercatores alienigenos concessam &c.]

[28. Vid. 27 E. 3. cap. 26. mentions the charter made by his grandfather to the merchants strangers, and by himself confirmed, by which 3d. in the pound is to be paid to him for merchandizes imported.]

[29. 30 E. 1. Rot. Fin. Memb. 13. grants custodiam pesagii plumbi averii de pondere & tronagii lanarum in villa nostra de Kingston super Hull qui valent &c. rendring farm &c.]

[30. 33. E. 1. Rot. Fin. Memb. 16. De tallagio assidend. in villa de Stamford & Grantham ad opus regis, que sunt de antiquo dominico corone nostre &c.]

[31. 2 E. 2. Rot. Fin. Memb. 5. De custodia pesagii de Kingston super Hull custod. pesagii plumbi averii de pondere & tronagii lanarum &c.]

[32. K. H. 3. granted to the Freres of St. Bartholomew of Smithfield de duobus piscibus de quolibet onere piscium transeunt. Pont. Lond. versus dict. civitat. quos reges semper habere solebant &c. 4 E. 2. lib. Parl. fol. 83.]

[33. 1 E. 1. Rot. Pat. Memb. 18. Cum rex novum auxilium in regno diversis mercatoribus ad certum tempus commiserat salvis foris facturis ratione predict. auxil. extra regnum asportat. vel etiam non solut. Commission was awarded to inquire of the forfeiture of which the merchants have not answered.]

[34. 25 E. 1. 7. The custom of male-tolt of wools raised without parliament, discharged, and enacted that no such custom shall be raised without their common assent, saving to us and our heirs the

[ 589 ]

Prynne's.  
Cott. Rec.  
Abr. 10.  
No. 15. does  
not concern  
this point.

See pl. 14.

See pl. 29.

the cust. m of wools, skins, and leather, granted before by the commonalty aforesaid &c.]

Tho' the word (says) is not mentioned in this act, yet the genera-

\* Fol. 179.

lity of the

words cloths, as well kerseys as others, comprise all; and there cannot be more significant and comprehensive words to include all manner of cloths. Per Hale Ch. B. Hard. 215. Mich. 17 Car. 2. in Scacc. in Case of Vere v. Sampson & al.

[35. 17 R. 2. 2. Every man may make and sell clothes, as well kerseys as other, of such length and breadth as him please, paying the aulnage, subsidy, and other devoyres, scilicet, of every piece of cloth after the rate 17 R. 2. cap. 3. The merchants and workers of clothes called worsted, may bring their bolts of single worsted to what parties them pleaseth (saving to \* the King's enemies) paying the subsidies and customs thereof due, without the devoyres of Calice.]

[26. 27 E. 3. cap. 4. stat. 1. A subsidy granted of every cloth sold (in England) to take of the seller over the customs thereof due, scilicet, of every cloth of assise wherein there is no graine 40d. &c.]

[37. 11 H. 6. cap. 9. recites divers statutes of proviso that every one may sell clothes called streits, paying to the King the aulnage, subsidy, customs, and other devoyres, that is to say, of every cloth, and of every piece of cloth after the rate contained in the said statutes. (But nota, that no custom nor subsidy is mentioned in any of the statutes there recited, but one of them [ 590 ] has the clause, (paying the aulnage, subsidy, and other devoyres, for every piece of cloth after the rate.))]

By an act of parliament 31 H. 6. a. subsidy was granted to

the said King of 4s. and 4d. out of every pack of wool, and 43s. and 4d. of every 240 woolfells; but after, in the same parliament, this subsidy was abated, and reduced to 33s. and 4d. for a sack of wool, and 33s. 4d. for 240 woolfells, and the payment limited for five years only. Dav. Rep. 11. a. Mich. 5. Jac. in the Case of Customs.

[38. 31 H. 6. cap. 6. N. 55. For 33s. 4d. to be paid for sack of wool by the said statute of 31 H. 6. as had been paid all the life of H. 6. but no answer to it.]

[39. The custom of poundage in Ireland, scilicet, to give 12d. to the King for every pound of merchandize exported and imported, was not due by the common law before the statute of 34 H. 6. but only by the said statute. M. 6. Ja. in the Exchequer. The City of Dublin's Case resolved. 3 Jac. cap. 16. ordains that kerseys shall not exceed 24 yards in length, and that for every kersey of 24 yards there shall be paid as much in custom and subsidy ratably, as such persons should pay unto his Majesty for one piece, and a third part of a piece containing 18 yards.]

[40. 12 E. 4. cap 3. Such customs and subsidies due to the King for the same clothes shall be paid. 11 H. 7. 6. accordingly.]

[41. 14 El. cap. 10. Act made to reform the length and breadth of kerseys, and weight, and recites that the Queen ought to have custom and subsidy according to the quantity of the cloth.]

[42. 27 El. cap. 18. for white fireits in the last proviso remedy is ordained againit defrauding the King of his customs of it.]

[43.

[43. 14 E. 3. 21. *The King consents not to increase the custom of wool &c. unless by assent of the parliament.*]

[44. 9 H. 5. 10. Of every chaldron of *sea-coal* which shall be sold to the people not franchised in the port of the town of Newcastle upon Tyne 2d. be due to the King of custom.]

[45. 21 E. 3. N. 31. Item pray the Commons that there where the *merchants* are wont to *buy clothes*, and are wont to *carry them over the sea*, and also *merchants-strangers* who are wont to come into England to buy clothes, and by reason of a custom *de novo* made, scilicet of every cloth 14d. of merchants of England, and of strangers 21d. so that by reason of this grievous custom no strangers come, and all the community of the land, of merchants and labourers impoverished, of which they pray remedy, and that this custom be ousted. Item, for clothes of worsted a new custom levied upon every cloth 1d. and of strangers 1d. ob. and of every \* Lit. 10d. and of a stranger 15d. to great damage of the people and labourers, and that this custom be ousted. Answer, It pleases our Lord the King, the prelates, counts and other people, that this custom stand in force; for it is as good reason that he take such profit of clothes † work'd within the realm, and carried out of the realm, as of wools carried out of the land, ‡ according to the carrying of cloths made of sack.]

Prynne's  
Cott. Rec.  
Abr. 57. No.  
31. but not  
so full.—  
\* Inf. 207.  
pl. 1. Litt.  
signifies a  
bed.  
† Orig. is  
(overs.)  
‡ Orig. is  
(solene la  
serant de  
draps overou  
du sack)  
ratable the  
cloth as the  
sack.  
Prynne's  
Abr. Cott.  
57. No. 31.

[46. Rot. Parl. 21 E. 3. N. 11. A new custom of wool and wine raised without assent of the Commons &c. See Answer to this.]

Prynne's  
Cott. Rec.  
Abr. 52. 53.  
No. 11.

Whereas in a council holden by Lionel the King's son, the guardian of England, it was in the 21st year of the King ordered without the Commons, that for keeping the realm and safe conduct of ships, should be taken upon every sack of wool passing the seas, 2s. upon every ton, 2s. upon every pound defavoires brought back into the realm 6d. and this charge to continue until Michaelmas next coming, which charge is yet demanded; that the King will be pleased that the same charge may be let fall, and to write his letters to the collectors thereof, that it cease.

[47. Rot. Parl. 25 E. 3. 1 Part, N. 37. Touching the custom of wool.]

Prynne's  
Cott. Rec.  
Abr. 76. No.  
37. A com.

plaint for taking 46 s. 8 d. for every 300 wool-fells, where the old custom was 3s. 4d. for every 100. The answer was, The old custom received ought not to be withdrawn.

[ 591 ]

[48. Rot. Parl. 43 E. 3. N. 10. A subsidy granted for three years, scilicet, 438. of every sack of wool exported &c.]

Prynne's  
Cott. Rec.  
Abr. 109.  
No. 10.

Upon declaration of the King's great necessity, the Lords and Commons granted to the King for 3 years, of denizens for every sack of wool, 43 s. 4 d. of every 20 dozen of fells, 43 s. 4 d. and of every last of skins, 41.—of aliens for every sack of wool, 3 s. 4 d. of every 20 dozen of fells, 53 s. 4 d. and of every last of skins 5 l. 6 s. 8 d. over the old customs.

[49. Rot. Parl. 25 E. 3. 1 Part. N. 22. The Commons pray, that where the merchants have granted to the King 40s. of a sack of wool which falls in charge of the people, and not of the merchants, that it please the King, for relief of his people, that the said 40s. be not demanded, nor levied hence forward &c. pray remedy &c. Answer, Because the subsidy was granted to the King for great necessity, which yet continues, and

Fol. 180.  
bis.  
Prynne's  
Cott. Rec.  
Abr. 75.  
No. 22. is  
only, that  
the subsidy

of wool, viz. of every sack may cease; the answer was, that the same was granted to the King for a time yet enduring.—\* Orig. is, (se monstre plus de 10. en auter.)

\* is seen ten times more in other things, which things being shewd to the great men and commons at this parliament assembled, the said Lords and Commons of common assent have granted to the King the said subsidy to take from the Feast of St. Michael next ensuing for two years.]

Prynne's  
Cott. Rec.  
Abr. 93.  
No. 26.  
The print  
agrees with  
the record.

[50. Rot. Parl. 36 E. 3. N. 26, enacted, *That where the Commons have granted a great subsidy, that it shall not be drawn into example, nor other thing demanded by grant of the merchants, or otherwise, but the ancient custom of half a mark of a sack &c.* See this print 36 E. 3. cap. 11.]

Prynne's  
Cott. Rec.  
Abr. 541.  
No. 34. is  
a different  
matter.

[51. Rot. Parl. 2 H. 5. 1 Part, N. 34. The Commons pray that where the people of Devon and Cornwall have not used at any time past to pay any custom called cocket, of any cloth called streit, the colour russet or white, be compelled to pay &c. pray remedy &c. Answer, The King will be advised.]

Prynne's  
Cott. Rec.  
Abr. 555.  
No. 21.—

[52. Rot. Parl. 5 H. 5. N. 21. In a petition of the Commons it is, that the merchants ought not to be charged for customs shewing their cockets. Answer, The lieutenant will send to the King to know what grace the King will make and grant. \* 5 H. 5. N. 20. pray the Commons that the merchants be not charged to pay the tenths, taxes, and tallages, but in the cities, vills, and burghs where they are resident. Answer, Be it done as has been used before this time.]

\* Ibid. No.  
20.

[53. 18 E. 3. Stat. 2. cap. 3. *That the sea be open to all manner of merchants to pass with their merchandizes where shall please them.*]

Prynne's  
Cott. Rec.  
Abr. 418.  
No. 24. is,  
That if they  
carry the  
goods by  
water to  
London,  
they shall  
not pay  
scavage,  
provided  
they bring  
testimonials from the customs, at Southampton.

[54. 4 H. 4. N. 24. Upon the petition of the merchants of *Seam*, it was ordained by the King, that if they bring any merchandize to the vill of *Southampton*, and there land them, and pay the customs due, and after bring the goods by land to the city of *London*, they ought not to pay there the custom called *scavage*. It is said in the petition, that the said custom was once before paid at *Southampton*, and that the city of *London* ought not of right to have the said custom of any merchandizes so brought by land, nor by sea, unless only of merchandizes coming over the sea to the said city first.]

Prynne's  
Cott. Rec.  
Abr. 395.  
[ 592 ]  
No 114.  
says, The  
print touch-  
ing sub-  
sides, for  
K. riefes,  
cap. 19.  
agrees with  
the record.

[55. 1 H. 4. N. 114. The Commons pray that no cloth of *Kersey*, *Kendall* cloth, *frise* of *Coventry*, *cogware*, nor no other streite nor remnant of *England*, nor cloth of *Wales* not used to be sealed of any seal small nor great do not pay no cocket nor other custom. And also no cloth of what \* measure soever it be not wont to be sealed of any seal called the *farthing seal*, till *John Waltham* late bishop of *Exeter*, in time of *Rich. 2.* was treasurer of *England*, made ministers in all counties throughout the realm to seal all manner of clothes aforesaid, and all other clothes which were wont to be sealed of custom &c. And upon this

this petition it is answered by the King as it is imprinted by the statute of 1 H. 4. 19. See 4 H. 4. N. 45. This statute prayed to be continued for the life of the King, but the King will be advised. Simile 5 H. 4. N. 70.]

—\* Orig. is (laieur) which in Richelet's French Dictionary

1732, signifies (metator.)

56. Where one merchant custom his merchandizes in the name of another merchant, this is good; for the intent of the statute is, that the King shall be surely served of his custom. Br. Customs, pl. 76. cites 2 H. 7. 14, 15.

(H. a) For the Goods of whom Custom shall be paid.

[1. THE patentee of the King of the goods of pirates seised by him shall pay no custom to the King; for the goods are given by the law to the King, and therefore he shall not have \* custom of his own goods. Mich. 5 Jac. in the Exchequer. Per Curiam.]

S. P. Lane  
19. Hill. 4  
Jac. Anon.

\* Fol. 171.  
bb.

2. Trespass for taking of goods; the defendants plead Not guilty. The jury find that the plaintiff was seised of the manor of D. and that time out of mind he and all &c. had and used to have all goods &c. wreck'd upon the high sea cast on shore upon the said manor, as appertaining thereto: that the goods were wreck'd upon the said manor, and that the plaintiff seised them as wreck. They further find, that by the act of 12 Car. 2. there was granted to the King a subsidy called poundage, viz. of all goods and merchandizes of every merchant, natural-born subject, denizen and alien, to be exported out of the kingdom of England, or any of the dominions thereto belonging, or imported into the same by way of merchandize, of the value of 20 s. according to the particular rates and values of such goods and merchandizes as they are respectively rated and valued in the book of rates, intituled the rates of merchandizes, after in the said act mentioned and referred to, to one shilling &c. Then they find that at the time of the seizure of the goods, the defendants were the King's officers duly appointed to collect the subsidy of poundage, by the said act granted; and that for the duty of poundage not paid at the said time, they seised and arrested the said goods untill the plaintiff had paid them the said poundage. And whether the said goods so wreck'd as aforesaid be chargeable with the said duty of poundage, was the question? And per Vaughan Ch. J. in delivering the opinion of the Court, wreck'd goods are no goods imported within the intention of the act; and consequently not to answer the King's duties; for goods as goods cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are. And wrecked goods have not owners to do these offices, when the act requires they should be done; therefore the act intended not to charge the duty upon such goods. And judgment for the plaintiff. Vaugh. 159. 160. 172. Hill. 23 & 24 Car. 2. C. B. Sheppard v. Gosnold & al'.

(I. a) *The Cause for which they were granted.*

[1. **T**HE subsidy of *tonnage of wines* was granted to E. 4. in the fourth year of his reign in special, *for the safeguard and custody of the sea*, and this appears by the 12 E. 4. cap. 3. where provision is made to prevent the deceit used not to pay the subsidy. B. Customes. 26. 9 H. 6. 12. 1 E. 6. cap. 13. recites that as well King H. 8. as H. 7. and other progenitors Kings of England time out of mind &c. *have had granted unto them, and enjoy'd of the commons of this realm by authority of parliament for the defence of the same, and keeping and safeguard of the seas for the intercourse of merchandize safely to come into the same your realm, and to pass out of the same, certain sums of money named subsidies, of all manner of goods and merchandizes coming in and going out of the same your realm*, and now for the great charge of the King &c. grants the subsidy of *tonnage &c.* and if any be after robbed by pirates or loses his goods by misfortune, he shall have power to ship so much again without paying custom. 1 Ma. cap. 18. *same statute renewed.* 1 El. 19. *accordingly.*]

(I. a. 2) *Customs. Defrauding the King of his Customs; punished or relieved; and what shall be said a Defrauding; and Pleadings as to Forfeitures.*

1. **A**N information for the King for transporting 1200 clothes, the custom not being paid; the defendant pleads, that he did not transport any uncusom'd clothes; a verdict is found, that the defendant transported 1100 statute clothes, which amount to the 1200 clothes mentioned in the count, and that the defendant has not paid custom for 600 of these 1100 clothes, and has paid custom for the residue of them: the King had judgment for all the 1200 clothes, and affirmed in error. The defendant pleaded in the principal case, that he did not ship any that had not paid custom, and it was found that he shipped 600, custom not being paid. If he had pleaded Not guilty, the King had been barred for so much as he had paid custom for. Note, Neither the quality nor the measure of the clothes are mentioned in the declaration; and yet it is well. In the principal case the verdict of the jury for 600, that had not paid custom, is a full verdict, which gives a forfeiture of the whole to the King. The finding that custom was paid for 500 clothes is out of the issue, and surplusage. Jenk. 191. pl. 96. cites 21 H. 7.

2. The statute of 1 E. 6. c. 12. ordains, *That if any merchant unlades any of his goods, the custom not being paid, or the collector agreed with, the goods shall be forfeited.* Jenk. 207. pl. 38.

The law for non-payment of custom is, that if any

part be not customed, the whole is forfeited; but not the ship for a small matter not customed. 38 E. 3. Jenk. 191. pl. 96.

A merchant stranger in his voyage, by reason of a great tempest which happened to him in his voyage, to lighten the ship threw so much of his merchandize into the sea, that he did not certainly know how much it was; upon his arrival in port he notified it to the collector, and they agreed for so much, and if more was found in the ship, that he should pay for it. Resolved that this uncertain agreement was sufficient, because of the said casualty, and the merchants invincible ignorance of the contents of the lading. Jenk. 207. pl. 38.—Pl. C. 1. Mich. 2. E. 6. Reniger. v. Fogollā.

3. A tinner articles to deliver tin to the merchant *custom-free*; after delivery it is seized for custom; and the merchant sues to be relieved, but is not, but his bill dismissed; for it is *in fraudem regis*. Hill. 26 & 27 Car. 2. Chan. Cafes 256. Papillon v. Hix. [ 594 ]

[For more of Customs &c. see the Acts of Parliament under that Head, which are too many to take in here.]

### (K. a) Mines.

See (V.)

[1. 1 E. 2. ROT. Fin. Memb. 15. De minera plumbi capta in manus Regis.]

[2. 1 E. 2. Rot. Chartar. Memb. 9. pro Petro de Gaveston comite Cornubie. The King granted totum comitatum &c. Petro Gaviston militi &c. and all the mines which were of such county of Cornwall &c. and that he should be viscount &c.]

[3. 3 E. 1. Rot. Pat. Memb. 29. De minera commissa rendring rent &c.]

[4. 10 E. 1. Rot. Memb. 9. The King had minera de Aldeveston in Cumberland.]

[5. 8 E. 2. Rot. Pat. part 2. dorso; Ne stannum ducatur extra regnum antequam cuneat. apud Lostwithiel. M. 4. and 7.]

[6. Rot. Parl. 8 E. 2. Memb. 6. dorso. Upon the petition of the town of Lostwithiel in Cornwall, it was ordained per auditores petitionum, that tin should be weighed, coined, sealed &c. there &c.]

[7. Rot. Parl. 8 E. 2. Memb. 7. Upon the petition of the commons of Devon, complaining that their arable lands were wasted by such as work'd in the stannaries, J. de F. and Jo. de T. are appointed guardians of the stanneries to enquire of these complaints, and do what shall be for the profit of the King and country.]

[8. Ibid. Memb. 12. Petition of the Commonalty of Cornwall for the ordering of the stanneries, where they complain that A. de Pisane, to whom the King had granted stanneries of the said county, distreined them to weigh the tin at Lostwithiel, and to sell it to him weigh'd by unlawful weight, and did not give for the \* best but 40 s. where they might, of other merchants, take six marks, wherefore by reason that the tanners cannot have the † value of their workmanship of the tin, by which, whereas he had before 3000 tanners working in Cornwall for the profit of the King, now he has but 500 tanners, thereby the King will

\* Orig. is (miller) which it seems should be (melieur.)

† Fol. 171.

lose this year 600 l. at least, and more afterwards; and there they say, that in taking their tin against their will, and by the said false weights he has gain'd 2000 l. and all taken for the King &c. so that they cannot have other merchandizes for their tin &c. Vide this.]

\* Orig. is  
(que est icy  
loueteyne  
que les gentes  
d'e enquisits  
d'estruerent  
de venir a  
les Courts &c.)

[9. Other petition there is *to have Justices to come there every year or once in two*, to take inquests for the distance of the place to go to the Courts of the King's Bench, Common Pleas, and the Exchequer; \* that it is the custom here that the people of inquests ought to come to the Courts &c.]

\* This be-  
longes not to  
this letter,  
but to (R).

\* Orig. is  
(come ils  
usent ore.)

[10. Other petition, that where in all England, a man \* ought not to take *prifes of wines till after the sale of 10, and 9 ton and an half*, and his ministers in Cornwall take the prifes after the sale of 9 ton and an half to the damage of the people, wherefore they pray that they may pay the common prifes as others in England. Other petition that the Justices should not come as they used to do in August, and in Lent, when the people ought to save, and get their living, to the great grievance of the people &c. And that his ministers and others in Cornwall do not use other measures than other people in other counties of England \* now use &c.]

[ 595 ]

[11. Respons. assignentur Jo. de Foyle & Rich. Peshamp-ton ad inquirendum &c. veritat. & si sit ad dampnum Regis & de eo, quod invenerint, certificent Reg. & Consil. & ulterius ibidem fiat quod de jure fuerit faciendum.]

Prvne's  
Cott. Rec.  
Abr. 56.  
No. 27.

\* Pryne's  
Cott. Rec.  
Abr. 71.  
No. 26. is  
a different  
matter.

\* Orig. is  
(lower.)

[12. Rot. Parl. 21 E. 3. N. 27. The Commons pray that the *tin of Cornwall be sold to all merchants*, and not that one alone shall buy it in gross, as they complain that one Tidman of Lin-borh now does to the great damage of the merchants. To which the King answered, that it is the profit which belongs to the prince, and it is lawful for every lord to make his profit of what is his. Simil. \* 22 E. 3. N. 26. and answer is, that this was answered at the last parliament.]

13. It appears in Rot. Parl. E. 3. Anno 11 & 12, that the people \* *sued to the King to dig silver in their own land*. And therefore it seems that mines of gold and silver belong to the King; and so it is contained in Libro Rastall de expositione terminorum legum Angliæ tit. Treasure trove, and at the request afore-said King E. 3. granted that they shall have it rendring to the King the third part of the silver, and so that they make the rest into plate, and bring it after to his coinage for such allowance as others have who bring plate to the mint. And it seems that it is no statute; for the King the Lords and the Prelates assented, and there is no mention that the Commons assented. Br. Prerogative, pl. 134.

\* Br. Coro-  
ne. pl. 135.  
contra, that  
all mines of  
metal, ex-  
cept mine  
of gold and  
silver be-  
long to the

14. And it is further there agreed, that *of other treasure the King shall have the one moiety, and the owner of the soil the other moiety*. And therefore it seems that mine of gold &c. is taken for treasure, and in the reading of Fitzjames how that the prerogative of the King is a treatise of the common law, and not statute nor declaration by parliament, and good proof of this there in Frowike's reading. And it seems by Fitzjames that \* *mine of gold*

gold and silver is the owner's of the soil; quære. Br. Prerogative, owner of the soil, and the mines  
Pl. 134:

of gold and silver belong to the King, as appears Libro Rastal, and by the records of the Tower.

S. P. For if the subject should have them, he by the law could not coin such metals, nor put a print nor value upon them. Dav. 19. a. Trin. 2 Jac. in the Case of Mixt Monies; cites Pl. C. 316. The Case of Mines.

The money of England is the treasure of England, and nothing is said to be treasure trove 'ut gold and silver; and this is the reason that the law doth give to the King mines of gold and silver, thereof to make money, and not any other metal which a subject may have, because thereof money cannot be made. 2 Inst. 577.

15. All the Justices and Barons agreed, that by the law all mines of gold and silver within the realm, in whatsoever lands or soil it be within the realm, belong by prerogative to the King, with liberty to dig and carry away the ore, and other such incidents thereto, as are of necessity to get at the ore. Pl. C. 336. Mich. 9 & 10 Eliz. in the Case of Mines.

The King may dig in the land of the subject for gold and silver; because quantum do lex aliquid alicui

concedit, concedere videtur & id sine quo res ipsa esse non potest. 12 Rep. 13. Resolved 4 Jac. in Parl. in the Case of Salt-petre.

16. If gold or silver be in ores, or mines of copper, or brass, tin, lead, or other base metal in a subject's soil; in such case, as well the gold and silver as also the base metal belongs de jure intirely to the subject who is proprietor of the land, if the gold and silver exceeds not the value of the copper or other base metal. But if the value of the gold or silver exceeds the value of the copper or other base metal, they were of opinion, that the Crown should have as well the base metal as the gold and silver; and that in such case it shall be said Mine Royal, or otherwise not. But if the base metal exceeds the gold or silver, then it draws the property of the whole to the proprietor of the land. Per Harper, Southcot and Weston J. But they three agreed; that because the information was, that the ore and mine of copper contain'd in it gold and silver, and the defendant did not deny it, but fully confess'd it, it shall be taken that the gold and silver were of the greater value; for the best shall be taken for the King by intendment, and therefore they assented, with all the other Justices and Barons, that judgment be given for the King. Pl. C. 336. in the Case of Mines.

But all the other Justices and Barons contra, that tho' the gold or silver in the base metal in the land of the subject be of less value than the base metal, yet as well the base me-

[ 596 ] tal as the gold or silver therein belongs by prerogative to the Crown, with liberty to dig for the same,

and to lay it upon the land of the subject and to carry it away, and that in such case it shall be call'd Mine Royal. Pl. C. 336. b. in the Case of Mines. — But ibid. 3. 8. b. to the end. The Reporter seems to doubt of this; and that if no regard shall be had to the quantity of the gold or silver in the base metal (there being issue naturally in every base metal), the King would have all the mines of base metal in the realm, and so this resolution to no purpose, there being according to Agricola no such mine, and so the resolution grounded on a defect of knowing the nature of base mines. And therefore the Reporter says, it seems to him, that the nature of base mines ought to be considered, and the value of the gold and silver in the base metal, and that it be at least of such value as to countervail the charge of the getting it, or otherwise, in his opinion, there is no reason that it should draw to the Crown the property of the base metal, but that the proprietor of the base metal should have the gold and silver also. But he says, that this precise point was not put to the Judges for their judgment. For by the confession of the defendant, that the ore contained gold or silver, which should be intended the best for the King, discharge'd them of this; for the defendant ought to have shewn that the ore contain'd some silver but not the greater value, nor so much as would answer the charge; absque hoc that it contain'd gold or silver in other manner, and then by this or the like pleading the Judges must have taken notice thereof in point of judgment, which now by the pleading was pretermitted; and for the more clear understanding, whether any base mine is without any gold or silver,

It is good to know authors and experience; for the truth of this matter ought to direct the judgments of the Judges.

17. If ore or mine be in the soil of a subject, of copper, tin, lead or iron, in which is no gold or silver, the proprietor of the soil shall have the ore and mine, and not the King by prerogative; for in such sterile base mettall no prerogative is given to the King; agreed by all the Justices and Barons. Pl. C. 336. b. in the Case of Mines.

But mines of gold and silver do not pass without special words; for they concern the King's prerogative. Jenk. 277. pl. 99.

18. Mine Royal, whether of base metal containing in it gold or silver, or be it of pure gold and silver, may by grant of the King be sever'd from the Crown and granted to another; for it is not an incident inseparable, but that it may be sever'd by apt and precise words; agreed by all the Justices and Barons. Pl. C. 336. b. in the Case of Mines.

Notonly the Kings of England in their times, but also the Dukes of Cornwall in their times, have had the pre-emption of tin; which is a privilege belonging and reserved unto themselves by their charters of liberties granted unto the tinners, which appertains unto them, as is conceived by the Learned, Ratione proprietatis tanquam summi dominis & proprietariis quam ratione prerogative sue; not unlike that which other Kings have in foreign countries, whereof Casaneus thus makes mention, Præteritur principes in emptione metallorum, al-

[ 597 ] leging an imperial constitution of the code for proof thereof; and of which pre-emption, as by some precedents may be proved, both the Kings of England and Dukes of Cornwall have made use, when otherwise they stood in need of money for the managing their affairs. Dod. Hist. of the Principality of Wales &c. 96, c<sup>o</sup>.

\* In answer to an objection that this statute extends only to tin within the land of the King himself, it was resolved, that by the said clause *sedere & fundere stannum terris nostris & vastis nostris & aliorum quorumcumque &c. sicut antiquitas consuevit &c.* it is manifest that the King hath all the tin, as well in the land of the subject as in his own proper land. It shall be absurd that the King shall reserve the emption of his own tin. The King grants stannatoribus nostris, divers liberties and immunities, which are all enjoy'd as well by the tinners in the lands of the subject, as by those in the lands of the King &c. 12 Rep. 11, the Case of the Stannaries.

20. The ministers of the King *cannot* undermine, weaken, or *im*pair any of the walls or foundation of any houses or out-houses, or barnes, stables, dove-houses, mills, or any other buildings, nor dig in the floor of any mansion-house. 12 Rep. 13. Resolved in Parl. 4 Jac. in the Case of Saltpeter.

21. *Nor in the floor of any barn* imployed for housing corn, hay, &c. But they may dig in the floors of stables and ox-houses; so that there be sufficient room left for the horses &c. of the owner, and so that they repair it in convenient time, in as good plight as it was before. Also they may dig in the floors of cellars and vaults, so that there be sufficient room for the necessaries of the owner, and so that the wine, beer, and other necessaries of the owner be not removed, or in any sort impaired; and they may dig any mudwalls, which are not the walls of any mansion-house, so that order be taken that the mansion-house be well defended as it was before; so they may dig in the ruins and decays of any house or buildings, which are not preserved for the necessary habitation of men. 12 Rep. 13. Resolved in the Case of Saltpeter.

22. They ought to make the places, in which they dig, so well and commodious to the owner, as they were before. Resolved. 12 Rep. 14. Case of Saltpeter.

23. And to work in the possession of the subject, but between sun-rising and sun-setting, so that the owner may make fasten the doors of his house, and put it in defence against mis-doers. Resolved. 12 Rep. 14. in the Case of Saltpeter.

24. And not to place or fix any furnace, vessels, or other necessaries in any house or building of the subject, without his consent, or so near any mansion-house as thereby it may receive prejudice or disquiet. Resolved. 12 Rep. 14. in the Case of Saltpeter.

25. Nor to continue in one place over a convenient time, nor to return again into the same place before convenient time be passed. Resolv'd. 12 Rep. 14. in the Case of Saltpetre.

26. Resolved also, that the owner of the land cannot be restrained from digging and making saltpetre; for the King hath not interest in it, as he hath in gold and silver in the land of the subject. For the King in case of saltpetre hath but \*purveyance, so that the property of it is in the owner, and for that he cannot be excluded of the commodity in his land. 12 Rep. 14. in the Case of Salt-petre.

\* See Purveyance.

27. The King by his patents grants to A. *ex mero motu, speciali gratia, & certa scientia*, an honour in fee, and all mines there; this grant does not pass mines of gold or silver, or if they are mixed with iron, or lead, or tin, so that the silver to be extracted exceeds the charge of getting it. If there be such mixed mines in the land of a subject, and without such proportion of silver in them as aforesaid, they belong to the King. Jenk. 277. pl. 99.

But if the King grants all mines which belong to the King in the land of a subject, in this case mines of gold and

silver pass; for the mentioning the lands of a subject waives the King's prerogative in this case; for the King can have no other mines in the lands of a subject. Jenk. 277. pl. 99.

28. 1 W. & M. Stat. 1. cap. 30. s. 4. enacts, That no mine of copper, tin, iron or lead shall be adjudged a royal mine, altho' gold or silver may be extracted out of the same.

29. 5 W. & M. cap. 6. s. 2. enacts, That all proprietors of mines wherein any ore shall be found, in which there is copper, tin, iron, or lead, shall hold and enjoy the same; notwithstanding that such mines or ore shall be claimed to be royal mines.

S. 3. Provided that their Majesties, and all claiming royal mines under them, may have the ore of such mines (other than tin ore in the counties of Devon and Cornwall) paying to the proprietors within 30 days after the ore is laid upon the banks, and before the same be removed, the rates following, viz. for all ore washed wherein is copper, 16l. per tun; and for all ore washed wherein there is tin, 40 s. per tun; and for all ore washed wherein there is iron 40 s. per tun; and for all ore washed wherein there is lead, 9l. per tun; and in default of payment, it shall be lawful for the proprietors to dispose of the ore.

S. 4. Nothing in this act shall alter the charters granted to the tanners of Devon and Cornwall, or any of their liberties, or make void the laws of the flannaries.

### (K. a. 2) Relegation.

[13.] IN the time of E. 1. there was a mine of silver. 1 E. 2. Rot. Pat. 1 part. M. 4. 26 E. 2. Rot. Fin. M. 11. De minere auri colligend. pro Rege. Among the petitions in the parliament 18 E. 1. fol. 2. there is such petition, *Stephanus de Asbby de London petit, quod Rex ei misereatur, & quod concedere velit quod possit ingredi civitatem ad supervidenda bona sua quæ non vidit per quatuor annos &c. Jurat quod non faciet quicquam contra Regem vel coronam, nec contra pacem, & Rex recipit eum ad gratiam, & ad moram in civitate.*]

[14. 2 E. 1. Rot. Clauso Memb. 13. Rex majori & vicecomitibus London &c. Precipimus &c. quod si Richardus A. &c. quos vos occasione quorundam transgressionum eis imposuistis cepistis & in prisona nostra de Newgate detinetis, tactis sacrosanctis evangelis juraverint coram vobis quod ipsi de cæteris in civitate predicta moram non facient nec ad eandem sine nostra & civium ejusdem civitatis licentia non revertentur, tunc eos a prisona predicta deliberetis & omnia bona & catalla sua per vos occasione predicta arrestata restituatis eisdem &c.]

15. Exile for a time is said by some to be a relegation. Co. Litt. 133.

Fol. 173.  
bis.

### (L. a) \* War.

\* When the Courts of Justice are open, and

[1. 51 H. 3. † E. Di. Kennilworth enacted *inter alia*, They that have nothing shall swear, finding sufficient surety, that from thenceforth they shall keep the peace, and suffer

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satisfaction and penance after the judgment of the church, except persons banished, to whom the King only may remit.] the Judges and Ministers of the same may

by law protect men from oppression and violence, and distribute justice to all, it is said to be time of peace. So when by invasion, insurrection, rebellions &c. the peaceable course of justice is disturb'd and stopp'd, so as the Courts of Justice be as it were shut up, then it is said to be time of war. And the trial hereof is by the \* Records and Judges of the Courts of Justice; for by them it will appear whether justice had her equal course of proceedings at that time or no; and this shall not be tried by jury. Co. Litt. 249. b. — To make a solemn war according to the law of nations, two things are required. 1st. That the waging thereof must on both sides be by the authority of such as have the supreme power in the commonwealth. 2. That certain rites or ceremonies be us'd therein. But of publick war less solemn, it is otherwise; for they may be without those ceremonies, and against private persons, and be waged by any magistrate. See Grotius de Jure Belli &c. 1st part. cap. 38. — Spelm. Gloss. verbo Guarra als. Guerra, translates it Bellum, and that it signifies not only that publick war which is waged by Princes, but private war also, which is between families, capitali inimicitia quam fœdam vocant) constitutas.

The getting of letters of reprisal against a nation, does not make a war between both States; nor can they be said to be at enmity. Molloy 10. cap. Marg. 10. cites 12 E. 3. fol. 13. Coram Rege & Concilio in Camera Stellarum. Mich. 2 R. 3. fol. 2. a.

[2. And after, in the same statute, if there be any of whom it is supposed that he will make or procure war, the Lord Legate and the King shall provide such surety as shall seem expedient, by sending them out of the realm for the time, or otherwise as they shall think convenient.]

[3. P. 13. E. 2. B. R. Rot. 12. The custodes of the truce give licence to certain men to go and sell and buy their merchandizes in Scotland, which was then enemy of the King. And for this the merchants were impleaded; and tho' the licence was void, yet they are pardoned by the King.]

[4. Rot. Parl. 3. H. 5. 2 Part. N. The Commons pray, that where any malefactors take any goods \* of one coming from Flanders, and any of them bring part of the goods, to the value of 40s. to the vill of Sandwich; and upon suggestion to the King a commission was granted to the constable of Dover, to levy of the vill aforesaid 80l. (for so much was suggested to be brought to the vill); and therefore pray that this commission be repealed, because it is against Magna Charta, upon suggestion without proof at the common law. Answer; Be the execution in the matter by the Chancellor of England, according to the form and effect of truces lately made between the realm of England and those of Flanders.] \* Orig. is (del un vent.)

[5. Rot. Parl. 43. E. 3. N. 25. The King granted to all his lieges, that they should hold to them and their heirs all lands, castles, cities &c. in France which they should conquer there &c.] Prynn's Cott. Rec. Abr. 110. No. 25. That they should enjoy and bear all such &c. except to the King, all royalties, and the lands of the church, and that every person of his own conquest and pawns should have charters.

[6. 15 H. 6. cap. 7. It was complained that alien friends freighted the ships of alien enemies, in supportation of the said enemies, by which it is enacted, Inasmuch as it is not contrary to the league between the King and some of his allies, that if it happen that any merchandizes of the aliens of the amity aforesaid, be taken by the said lieges after &c. or any ships or vessels of the said enemies of the King, not being under the King's safe

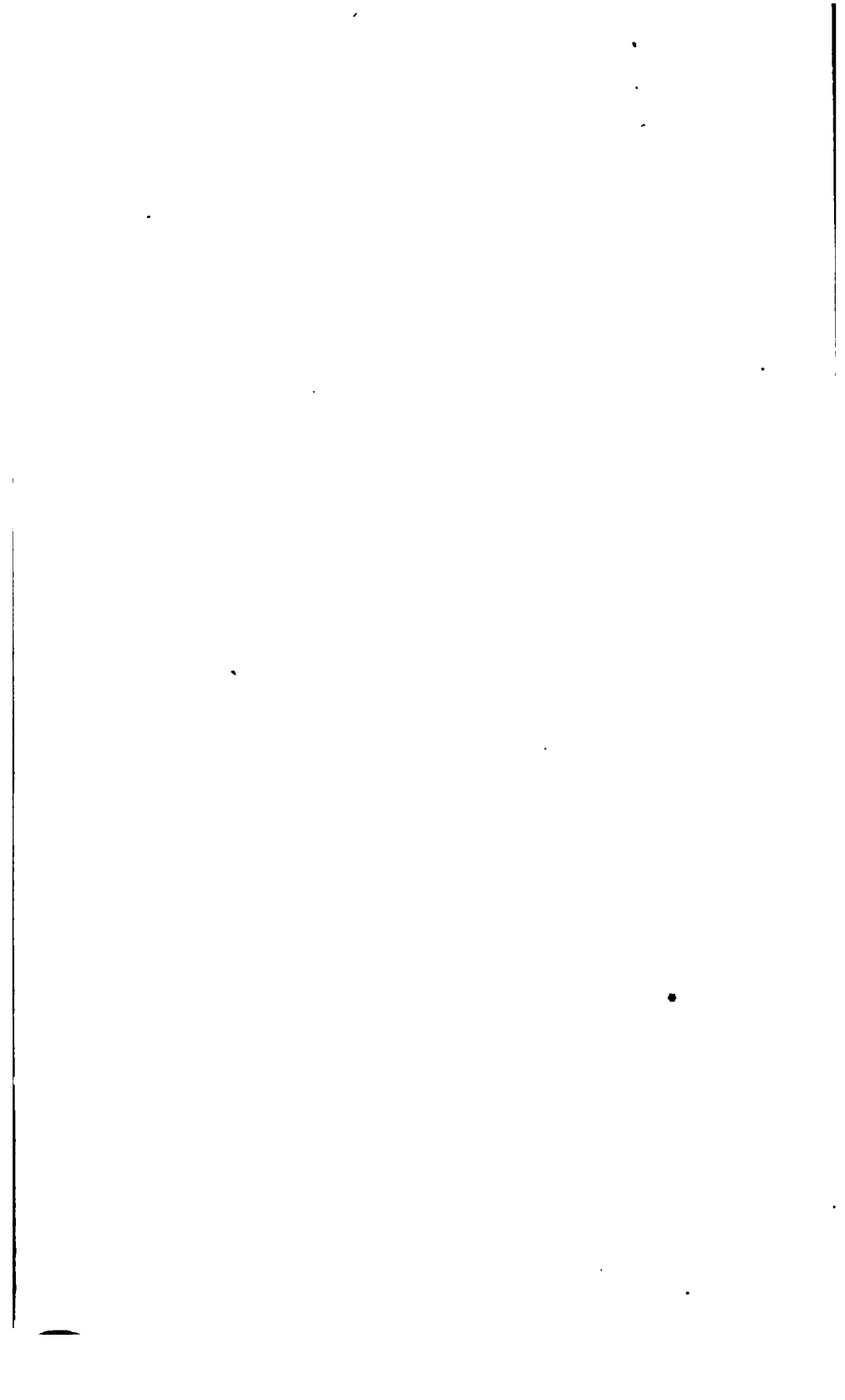
safe conduct and protection, that then the said lieges may then retain and enjoy without any impeachment or restitution thereof to be made. This was ordained to continue for two years, and longer if the King please. 18 H. 6. cap. 9. accordingly.]

[7. It is lawful to take the ships, goods and merchandizes of the King's enemies, if they have not *safe conducts inroll'd in Chancery*. 20 H. 6. cap. 1. 27 H. 3. Rot. Vafcon. Charter and Patent. In Mr. Selden.]

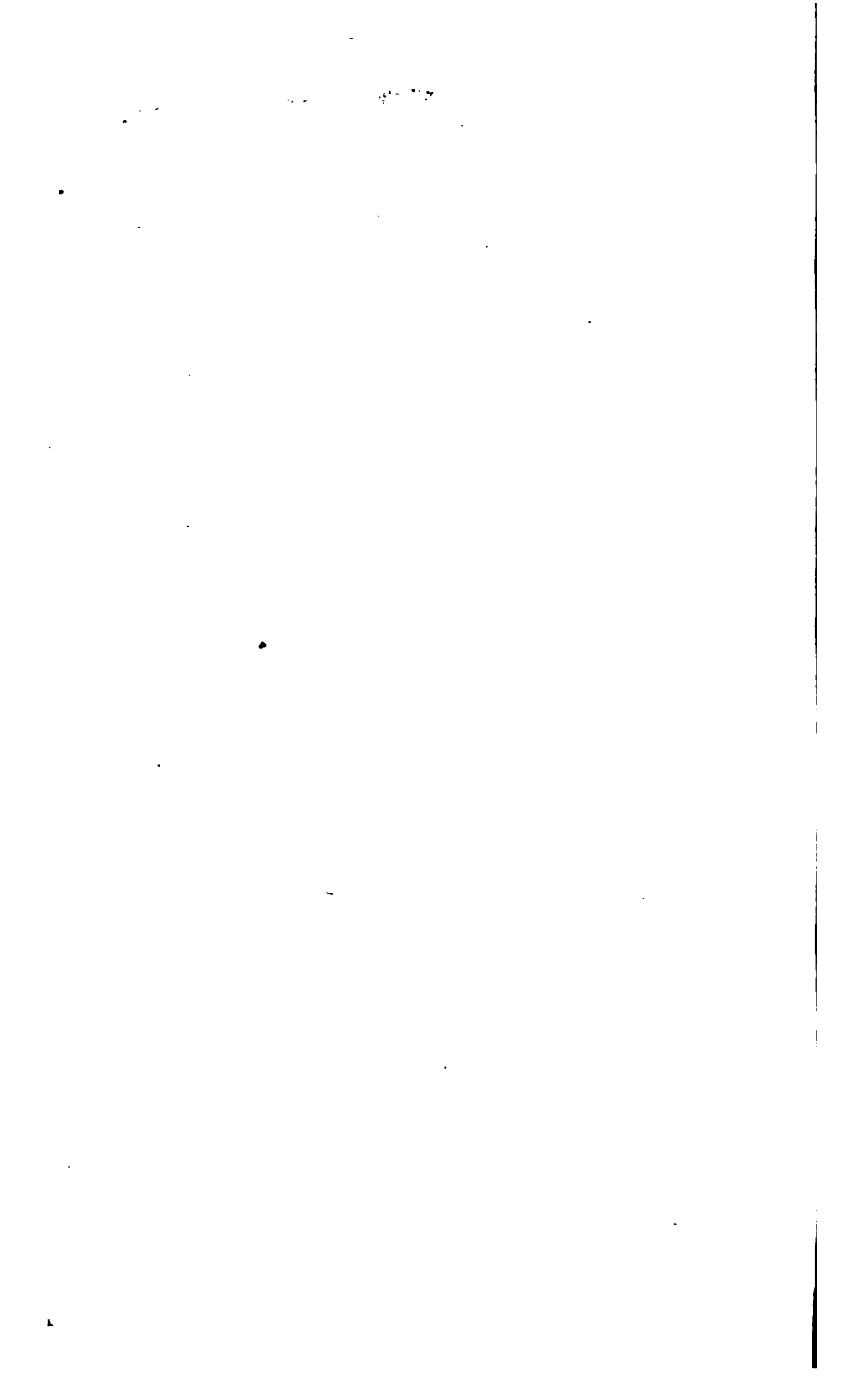
[8. The King grants licence to to take the goods of his enemies by land and by sea, so that the King have the moiety.]

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The case was, A Spanish merchant brought a bill in the Exchequer Chamber before the King and Council against divers Englishmen, setting forth, that depredatus & spoliatus suite upon the sea juxta partes Britanniz per quendam virum bellicosum de Britannia de quodam navi and of divers merchandizes therein, which were brought into England, and came unto the hands of divers Englishmen, naming them; and had process against them: they came in and pleaded, that in regard this depredation was done by a stranger, and not by the King's subjects, they ought not to be punished; for the *statute 31 H. 6. cap. 4.* gives restitution by the Chancellor in cancellaria sibi vocato uno Judice de uno Banco, vel altero; and by the *statute 27 E. 3. cap. 13.* that restitution may be made by the Chancellor himself without any Judge; it was resolved, that (*quisquis exivaneus &c.*) who brings his bill upon this statute to have restitution, *debet probari, quod tempore captivis fuit de amicitia domini regis*; and also that he who took him and robb'd him was also sub obedientia regis, vel de amicitia domini regis five principis querentis, because if he was an enemy, and as such took the goods, then non fuit spoliatio, nec depredatio, sed legalis captio, prout quilibet inimicus capit super unum & alterum. And this was the opinion of all the Judges then in the Exchequer Chamber. Cited by Coke Ch. J. 2 Bulst. 28. Pasch. 13 Jac. in Marsh's Case — S. P. in the Case of Samuel PELAEZ ambassador from the King of Morocco to the States General, who in his return took a Spanish ship. But there being open hostility between Spain and Morocco, this in judgment of law is not spoliatio, but legalis captio. And if one enemy do take the goods of another, this is not felony. Cited by Coke Ch. J. 3 Bulst. 27. 28. — S. C. 4 Inst. 152. — Roll R. 175. S. C. by name of PALACHIE's Case, cited by Coke. And it being agreed by the civilians, that the Spanish ambassador might proceed civiliter against Pelaez for the goods here, because they are *in solo amici*, the Reporter says quare: for it seems that by the *law of nations* one enemy may lawfully take from another. — 4 Inst. 154. says it was resolved by Popham Ch. J. and the whole Court of B. R. Trin. 2 Jac. to be against the law of England, to proceed civiliter in the Admiralty; where the case was, That the King of England was in league with Spain and the Hollanders, and there was enmity between the King of Spain and Holland; and a Hollander upon the high sea in aperto pratic, took the goods of a Spaniard, and brought them into England infra corpus comitatus; and because the goods were in solo amici, the Spaniard labelled for them civiliter in the Admiralty, it was resolved per tot. Cur. of B. R. upon conference and deliberation, that the Spaniard had lost the property of the goods for ever, and had no remedy in England for them; and relied principally upon the book of 2 R. 3. being of great authority. And Lord Coke says, That the Solicitor for the King of Spain was at first much offended with this resolution of B. R. but when he had taken advice, and understood the reason thereof, he was well satisfied — And it was resolved in Palachie's Case, that had he not been an ambassador, he could not be a pirate or a felon. Ibid.









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